No. 29
~~525~~

In the Supreme Court of the United States

OCTOBER TERM, 1956

THE UNITED STATES, PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (a Corporation), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims, entered in the above cases on February 20, 1956.

OPINIONS BELOW

The original opinion of the Court of Claims and its opinion on rehearing are set out in the Appendix, *infra*, pp. 1-130.[1]

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[1] The Court of Claims' earlier opinions overruling the Government's demurrer are reported as *Idaho Maryland Mines Corp.* v. *United States*, 122 C. Cls. 670; *Homestake Mining Co.* v. *United States*, 122 C. Cls. 690 and *Central Eureka Mining Co.* v. *United States*, 122 C. Cls. 691.

JURISDICTION

The judgment of the Court of Claims was entered on February 20, 1956 (App., *infra*, p. 122). A motion by the United States for a new trial, seasonably filed, was denied July 12, 1956 (App., *infra*, pp. 123-130). By order of the Chief Justice signed on October 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including October 24, 1956 (App., *infra*, p. 131). The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

In order to conserve scarce war materials and to bring about the voluntary relocation of skilled manpower to more vital mining activities, the War Production Board, on October 8, 1942, issued Limitation Order L-208, requiring those gold mines deemed nonessential to this country's war effort to be closed in the shortest possible time and prohibiting their acquisition or use of any material, facility, or equipment for mining except the minimum necessary for adequate maintenance. The Order contained no provision for routing the scarce war materials held by the mine owners to the more urgent users of such materials. During the period that the order was in effect, the Government did not otherwise interfere with the owners' exclusive possession and control of the mines. The questions presented are:

1. Whether Limitation Order L-208 resulted, under the Fifth Amendment, in a temporary taking of the owners' right to mine gold.

2. Whether, if there were a temporary taking, such action by the War Production Board was authorized, so as to impose liability therefor upon the United States.

STATEMENT

This is an action for just compensation under the Fifth Amendment for the alleged temporary taking of some nine gold mines pursuant to War Production Board Limitation Order L-208 during World War II. The Court of Claims, two judges dissenting, concluded that the Government had taken the owners' right to mine gold for which they were entitled to compensation under the Fifth Amendment, and reserved determination of the exact amounts of recovery for further proceedings.[2] The pertinent facts as found by the Court of Claims may be summarized as follows:

1. *Period prior to issuance of Limitation Order L-208.* By October 8, 1942, when Order L-208 was issued, the War Production Board had been delegated broad powers to regulate the production and supply of materials essential to the prosecution of the war effort (App., *infra*, p. 51).[3] By a system of priorities, man-

[2] Under Rule 38(c) of the Rules of the United States Court of Claims, trials in the first instance may be limited to the issues of law and fact relating to the right of recovery, with the amount of recovery reserved for further proceedings. In *United States* v. *Caltex (Philippines) Inc.*, 344 U.S. 149, also coming to this Court from the Court of Claims, the issue of liability was reviewed on certiorari before the amount of recovery was determined. See Petition in No. 16, Oct. T., 1952, p. 2, fn. 2; 343 U.S. 955. In the analogous situation in patent cases where the issues of infringement and damages are separately tried, the judgment on infringement has also been reviewed on certiorari before trial of the issue of damages. *United States* v. *Esnault-Pelterie*, 299 U.S. 201; *Marconi Wireless Co.* v. *United States*, 320 U.S. 1, 47. See also *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 341 U.S. 48.

[3] The power to allocate materials and facilities, wherever deemed necessary and appropriate in the public interest and to promote the national defense, was granted by Congress to the President in the Second War Powers Act. See 2(a)(2) of 54 Stat. 676, as amended by 55 Stat. 236 and 56 Stat. 177. This power was delegated to the War Production Board by a series of Executive Orders:

datory orders, and orders which prohibited or curtailed the manufacture of end products,[4] the War Production Board attempted to increase production and conserve essential materials, supplies, and equipment (App., *infra*, pp. 51-52). To serve these ends, the Board often had to consider means of attaining the maximum utilization of manpower—a problem inherent in any attempt to increase production (App., *infra*, p. 53).

As the shortage of critical war materials became increasingly acute during 1941 and the early months of 1942, the mining industry generally was subjected to progressively more stringent limitations (App., *infra*, pp. 53-62). Finally, on March 2, 1942, Preference Rating Order P-56 was amended so as deprive gold and silver mines of all priority ratings formerly available. This was accomplished by revoking the "serial numbers" of all mines (including those of respondents here) where the production of gold or silver, or both, relative to other minerals, constituted thirty percent or more of the total value of the extracted ore (App., *infra*, p. 61). Although an earlier unrevoked priority order permitted the gold mine operators to obtain maintenance, repair, and operating supplies with a priority position equal to that of the least essential industries in the United States, the demand for the equipment was so far above available supply that the possibility that the gold mines would obtain any was remote (App., *infra*, p. 62). Thus, by granting the lowest possible priority rating in a market where supplies

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see Executive Order 9024 (7 Fed. Reg. 329); Executive Order 9040 (7 Fed. Reg. 527); Executive Order 9125 (7 Fed. Reg. 2719).

[4] For instance, during the war, production of office machinery, furniture, bicycles, stoves, refrigerators, and laundry equipment was suspended or limited (App., *infra*, p. 52).

were exceedingly scarce, the War Production Board had effectively eliminated the possibility of acquisition by the gold mines of critical materials or supplies (App., *infra*, p. 62).

2. *Issuance of Limitation Order L-208.* In the summer of 1942, the Labor Division of the War Production Board became concerned with the problem of an acute shortage of hardrock or underground miners in the vital non-ferrous copper mines (App., *infra*, p. 62). The primary reasons for this shortage were the draft, and the migration of workers out of the mine fields because of higher wages and better working conditions in other war industries (App., *infra*, p. 63). Accordingly, it was suggested to the War Production Board that, if the gold mines were closed, the unemployed miners would probably be diverted to copper mining, thereby alleviating a shortage which severely threatened the national war effort (App., *infra*, p. 65). In this connection, it was recognized that there was no authority to require the miners to transfer to industries in which their services were more urgently required (App., *infra*, p. 66); and further that the workers thus made available by the closing of the gold mines might very well go to work in the West Coast war plants instead of in the non-ferrous copper mines (App., *infra*, p. 66).

Despite these doubts as to the outcome of the proposed order, the War Production Board, on October 8, 1942, issued Limitation Order L-208 (App., *infra*, p. 85). Specifically, the Order directed that each gold mine without a priority "serial number" (1) should close down in the shortest possible time; (2) that, after seven days, no material or equipment should be ac-

quired, consumed, or used to break new ore or proceed with any new operations; and (3) that, after sixty days, no material or equipment should be acquired, consumed, or used to remove any ore or conduct any operation except to the minimal amount necessary to maintain the properties safe, accessible, and in good repair (App., *infra*, p. 86). In the Order closing the gold mines, no attempt was made by the Board to impose mandatory orders for delivery of the materials and facilities then possessed by the various mine operators to critical industries (App., *infra*, p. 90).

Notwithstanding the Order, only an insignificant number of hardrock miners actually transferred to the copper mines (App., *infra*, p. 89). Eventually, the acute labor shortage in the copper mines was alleviated by the Army's granting of furloughs to four thousand men for work in the copper mines—an action the Army had not been willing to institute so long as the gold mines continued in operation (App., *infra*, p. 84).

Finding that (1) Order L-208 explicitly ordered respondent gold mines to suspend operations, (2) the Order did not allocate the supplies and equipment remaining in the mines at the time of the shutdown to specific users in more essential industries, and (3) a major consideration in the decision to close the mines was consequential relocation of manpower in mines which extracted minerals more essential to the war effort than gold ore, the Court of Claims held that, while the War Production Board was authorized to impose such regulatory controls, Order L-208 nevertheless exceeded the permissible bounds of regulation

and, consequently, that the action of the Board constituted a "taking" entitling the gold mine operators to just compensation under the Fifth Amendment (App., *infra*, pp. 1-33).[5] Chief Judge Jones and Judge Laramore dissented (App., *infra*, pp. 47-50).

REASONS FOR GRANTING THE WRIT

The Court of Claims, in holding that Limitation Order L-208 went beyond the bounds of permissible regulation and resulted in a Fifth Amendment taking, although the Government at no time interfered with the owners' exclusive possession of the mines, has erroneously decided an issue of unusual constitutional importance in the twilight zone between non-compensable regulation and compensable takings. Not only is the decision directly contrary to the Court of Claims' prior rulings in *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U.S. 948, and *St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271, certiorari denied, 335 U.S. 815 (see also *Alaska-Pacific Consolidated Mining Company* v. *United States*, 120 C. Cls. 307), but it is at odds with the prior decisions of this Court. And in addition to the fact that a large number of cases arising under the same Limitation Order are now pending in the Court of Claims—as to which the Government's liability under the decision below may well aggregate

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[5] While holding that in general there had been a compensable taking, the court dismissed three of the nine complaints. Oro Fino's claim was dismissed because plaintiff was either not the real party in interest or it claimed under an invalid assignment (App., *infra*, p. 39); Alabama-California Gold Mine Co. ceased operations two months prior to the issuance of Order L-208 (App., *infra*, p. 43); and Consolidated Chollar Gould & Savage Mining Co. was granted permission to continue mining operations after Order L-208 was issued and its eventual suspension of mining operations was pursuant to a voluntary decision (App., *infra*, p. 43).

tens of millions of dollars—a more definitive delineation between "regulation" and "taking" is needed as a guide for use in the current and continuing preparation for possible future national or war emergencies.

1. *(a)*. In the *Oro Fino* case, *supra,* the plaintiff, as do respondents here, sought just compensation for the alleged taking of a gold mine under Order L-208.[6] Stating that "[t]he issue is whether L-208 was a regulation or a requisition" (118 C. Cls. at 24), the Court of Claims—after extensively reviewing this Court's numerous decisions affirming that under the war power the Government may properly impose value-impairing restrictions on the use and disposition of property without becoming liable for just compensation under the Fifth Amendment (see *infra,* pp. 12-15) —concluded (we believe properly) (118 C. Cls. at 28, 29-30):

> We think that the principle that the use and enjoyment of property may under proper circumstances be regulated or restricted or even temporarily suspended in order to protect the whole public, is applicable to the case at bar. The war provided the proper circumstances. The United States did not take plaintiff's property or impose a servitude on it, as Pennsylvania was held to have done in the *Pennsylvania Coal* case [*Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393]. What the Government did here was to impose a permissible restriction upon the use by plaintiff of

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[6] In that *Oro Fino* case, the Court of Claims dismissed the complaint on the Government's demurrer. While the decision here was made after trial, the evidence merely elaborated upon the conclusory allegations of the first *Oro Fino* complaint.

its property in the interests of the general safety. * * *

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* * * It is clear that a taking was not intended. The defendant did not deprive plaintiff of property by bestowing a right on another, as the statute in the *Pennsylvania Coal* case in effect did. The Government did not take over or use plaintiff's land; it did not take any gold; there was as much gold in the Oro Fino mine on June 30, 1945, when Order L-208 was revoked, as there was on January 18, 1943, when the mine was closed. Title and possession remained in plaintiff. The Government merely forbade, for the time being, the mining of gold on this land. If this had the effect of depriving plaintiff temporarily of the only interest it had in the land, and if, because plaintiff's interest was not in fee but was for a definite duration, it made that interest less valuable, these adverse effects were incidents, not so much of Order L-208, as of the kind of ownership that plaintiff had. The Government is not liable for such effects.

In so holding, the court expressly adhered to principles it had followed in the *St. Regis* case, *supra* (see 118 C. Cls. at 20). In *St. Regis,* the War Production Board, in order to alleviate a serious pulpwood shortage, prohibited all plants in a defined area of the United States from consuming, processing, or delivering any pulpwood without specific authority, and ordered the company to sell its entire supply of pulpwood to specified critical users at OPA ceiling prices. Although the company was thereby forced to suspend

operations for the period of the limitation order, the Court of Claims ruled (110 C. Cls. at 278, 279):

> It amply appears from the petition that defendant did not actually "acquire by condemnation * * * any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for * * * war purposes" as it might have done under authority of the Second War Powers Act (56 Stat. 176, 177; 50 U.S.C.A. App. sec. 632). It did not, as plaintiff argues, take over the complete dominion and control of plaintiff's property, nor appropriate to itself any right to the use and enjoyment of plaintiff's plant or any part thereof. On the other hand it is equally apparent from the allegations of the petition that the determinations and directions of the War Production Board respecting plaintiff's Tacoma plant did have the effect of depriving plaintiff of the use of said plant in the consumption and processing of pulpwood, in order that manufacturers in more strategic areas might employ, in the manufacture of war materials, the pulpwood which plaintiff would otherwise have consumed, and that it was intended to accomplish this end notwithstanding it should mean the forced closing down of plaintiff's mill. * * *

(b). In its lengthy opinion in this case the Court of Claims does not discuss its prior *Oro Fino* decision[7]

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[7] In overruling the Government's demurrers in these cases (see *supra*, p. 1, fn. 1), the Court of Claims distinguished *Oro Fino* on the basis of the more extensive and detailed allegations, contained in the amended petitions, of arbitrary action by the War Production Board in issuing Order L-208. See *infra*, p. 14, fn. 11.

and attempts to distinguish *St. Regis* on two grounds: (1) that Order L-208 expressly required that the gold mines be closed in the shortest possible time, and (2) that Order L-208 did not undertake to allocate the critical supplies and equipment of the gold mines to war plants (App., *infra*, pp. 21-23, 32). These factual differences do not justify a difference in legal result. In *St. Regis*, the court expressly recognized that the restriction placed upon the company by the Government left the company no choice but to shut down. 110 C. Cls. at 279, *supra*, p. 10. On the other hand, even if the shutdown requirement had been omitted from Order L-208, the same cessation of operations would have been effected by the Order's other provisions forbidding the operator of a non-essential mine from acquiring, consuming, or using any material, facility or equipment. Indeed, in *Oro Fino* the court rejected this very distinction (118 C. Cls. at 29):

> * * * We see no relevance in the distinction between the cases, urged by plaintiff, that Order L-208 was a direct order to plaintiff to close down while the order in the *St. Regis* case merely forbade the paper company to use the materials it needed to continue to operate. We decline to hold that the Government may not do directly what we have already held it may do indirectly.

Similarly without substance is the court's further distinction *i.e.*, that in Order L-208 the War Production Board did not allocate to more essential users the critical supplies and equipment on hand in the gold mines when the Order was issued. The disposition of these supplies was admittedly not the prime purpose of the allocation order (*supra*, p. 5), nor did the

Board undertake completely to distribute every item of supply or equipment that might be of service to the war effort. As Chief Judge Jones, dissenting here, points out (App., *infra*, p. 48),

> * * * even those who were engaged in essential wartime industry were often merely given priority orders which were little more than hunting licenses and these industries had the task of locating and securing the critical materials.

The fact that the Board did not undertake to control the disposition of the supplies and equipment held by the mine owners indicates, not an excessive use of the allocation power as the Court of Claims held, but a use of that power which was far more limited than that in *St. Regis*.

2. (*a*). Even apart from the Court of Claims' prior decisions, established principles suggest that Order L-208 did not result in a "taking" of the gold mines. It is clear that there was no affirmative use or invasion of the mines by the Government, nor was ownership or possession transferred to the Government; instead, the owners retained complete title to, and possession of, their mines. The sole impact of Order L-208 was negative, *i.e.*, to forbid the owners from using their mines to extract gold during the war period, and since there was as much gold in the mine when Order L-208 was revoked as when it was issued, the effect of the Order was simply to suspend until after the war the extraction of the gold.

Such an imposition by the Government falls short of a taking for public use, which almost always requires that there be some positive invasion of the property, some use *by* the United States. See, *e.g.*, *United*

States v. *Pewee Coal Co., Inc.*, 341 U.S. 114; *United States* v. *Causby*, 328 U.S. 256; *United States* v. *General Motors*, 323 U.S. 373; *Portsmouth Co.* v. *United States*, 260 U.S. 327; *Richards* v. *Washington Terminal Co.*, 233 U.S. 546; *United States* v. *Welch*, 217 U.S. 333; *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166.[8] The requirement of public *use* consequent upon a taking is set out in the Fifth Amendment itself and has recently been emphasized by this Court in *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149, 155. Significantly, in the instant case, it was the lack of any usefulness of the gold mines for the war effort which led to the issuance of Order L-208.

(b). Nor, in our view, does this case fall within the very limited category of takings resulting when a regulatory order interferes too severely or extensively with the use or control of property. See, *e.g.*, *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393. Until now, this narrow exception has been restricted to peacetime situations,[9] and while war does not suspend the Fifth

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[8] The so-called destruction cases (of which the flooding decisions are representative) clearly involve an affirmative invasion of property. See, *United States* v. *Welch*, 217 U.S. 333 (cited by the court below at App., *infra*, p. 19). This is also true in regard to other cases cited below. See *United States* v. *General Motors*, 323 U.S. 373; *Richards* v. *Washington Terminal Co.*, 233 U.S. 546; *Kimball Laundry Co.* v. *United States*, 338 U.S. 1. See App. *infra*, pp. 19, 32.

In *United States* v. *Pewee Coal Co., Inc.*, 341 U.S. 114, the Court found that the Government had taken *actual* possession of the coal mine, and that that possession and control amounted to a taking. See 341 U.S. at 114-117; cf. *United States* v. *Wheelock Bros., Inc.*, 341 U.S. 319.

[9] The *Pennsylvania Coal* case is distinguishable on at least two additional grounds: first, the restriction in that case was for the particular benefit of a single private house, while here the restriction was clearly for the nation as a whole; and second, the restriction in *Pennsylvania Coal* was permanent while here it was only for the temporary period of actual hostilities. See also *supra*, pp. 8-9.

Amendment it is clear that war or emergency are circumstances justifying governmental action without compensation which might be questionable in periods of less stress. Thus, in time of war or emergency, rent control can be imposed. *Woods* v. *Miller*, 333 U.S. 338; *Bowles* v. *Willingham*, 321 U.S. 503; *Block* v. *Hirsh*, 256 U.S. 135.[10] Commodity prices can be limited (*Yakus* v. *United States*, 321 U.S. 414; *Morrisdale Coal Co.* v. *United States*, 259 U.S. 188) and profits can be renegotiated. *Lichter* v. *United States*, 334 U.S. 742. Materials may be allocated among producers and distributors (*L. P. Steuart & Bros., Inc.* v. *Bowles*, 322 U.S. 398); prohibition of liquor may be ordered (*Ruppert* v. *Caffey*, 251 U.S. 264; *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146); and rights under a contract may be frustrated. *Omnia Commerical Co.* v. *United States*, 261 U.S. 502. Here, the Court of Claims agreed that the restriction on acquisition, use, and consumption by the mines of materials and supplies was a reasonable exercise of the wartime allocation power (App., *infra*, p. 32), and also that the War Production Board's objective of better manpower utilization was unobjectionable (App., *infra*, p. 30).[11]

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[10] Justice Holmes' statement in *Block* v. *Hirsh*, *supra*, that "[a] limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change" (256 U.S. at 157) indicates that emergency restrictions are least likely to result in a taking where they are imposed for a temporary period.

[11] Despite its holding that the War Production Board was authorized to issue an order to achieve these objectives (App., *infra*, p. 30), the Court of Claims also stated that the issuance of Order L-208 was arbitrary. This appears to be based on the premise that it was unreasonable to believe that gold miners would voluntarily transfer to the copper mines where workers were vitally needed. But the facts were that, when Order L-208 was issued, manpower was emphatically needed and, while there was a difference of opinion

The fact that the owners of the gold mines suffered some damage and incurred expense—though retaining the gold and the mines intact—does not, of course, serve in itself to convert Order L-208 from valid regulation to a Fifth Amendment taking. It is settled that even substantial damages or injury flowing from a valid exercise of the war powers need not be compensated. *Morrisdale Coal Co.* v. *United States*, 55 C. Cls. 310, 316, affirmed, 259 U.S. 188; *Royal Holland Lloyd* v. *United States*, 73 C. Cls. 722; see *Block* v. *Hirsh*, 256 U.S. 135; *Bowles* v. *Willingham*, 321 U.S. 503; *Woods* v. *Miller Co.*, 333 U.S. 138; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 155-158; *Omnia Commercial Co.* v. *United States*, 261 U.S. 502; *United States* v. *Carver*, 278 U.S. 294; *Transportation Co.* v. *Chicago*, 99 U.S. 635; *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149; cf. *Miller* v. *Schoene*, 276 U.S. 272, 279-280. As stated by the Court in *Lichter* v. *United States*, 334 U.S. 742, 754:

> In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself.

3. In addition, the Court of Claims has ignored the significant factors that (1) the War Production Board did not have the authority to requisition property in

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as to whether the Order would be effective, the prospects of success as they appeared at that time, rather than by hindsight, justified the War Production Board's action. In any case, if the Order were arbitrary and so invalid, the judicial relief available was a suit to enjoin enforcement, not for compensation for damages. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, *infra*, p. 16.

circumstances such as are here involved [12] and (2) the Board did not intend, nor did it purport, to exercise any requisitioning authority that it had.

While its original opinion in these cases appears to take a contrary view (App., *infra*, pp. 23-31), the Court of Claims recognized these factors in its opinion on rehearing (App. *infra*, p. 125); and it also acknowledged the rule that the Government may not be held liable for an unauthorized taking (see, *e.g.*, *United States* v. *Goltra*, 312 U.S. 203; *United States* v. *North American Co.*, 253 U.S. 330; *Hooe* v. *United States*, 218 U.S. 332 [13] (App., *infra*, p. 126)). Nevertheless, the court reaffirmed its earlier conclusion that the taking was authorized, reasoning that the Government in

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[12] None of the statutes referred to by the court in its original opinion (App. *infra*, p. 3, fn. 1) authorized the taking which the court held occurred here. The Selective Service and Training Act of September 16, 1940, 54 Stat. 885, authorized, in Section 9, only the placing of "mandatory orders" with firms "for such product or material as may be required and which is of the nature and kind usually produced or capable of being produced by such" firm. The Act of October 10, 1940 (54 Stat. 1090) authorized the requisition of "military or naval equipment or munitions, or component parts thereof, or machinery, tools, or materials, or supplies necessary for the manufacture, servicing or operation thereof" * * * held for export. And the Act of October 16, 1941 (55 Stat. 742) provided:

> * * * whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions, is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property * * *.

[13] This principle seems to have been confirmed and applied in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585.

issuing Order L-208 merely used "an *unauthorized* means of accomplishing an *authorized* taking" (emphasis in original) (App., *infra*, p. 129); to buttress this result, the court quoted from this Court's recent opinion in *Hatahley* v. *United States*, 351 U.S. 173 (App., *infra*, pp. 128-129).

But the Court of Claims' rationale is erroneous, even if it be assumed that that court has jurisdiction wherever a taking by the particular agency is authorized and that the agency's failure to follow the prescribed statutory procedure does not oust the court of authority. As we have already indicated, *supra*, pp. 15-16, the War Production Board—the agency which issued Order L-208—had not been given any power to take this kind of property. Unless the principle that the Government may not be held responsible in damages for an unauthorized taking is to be jettisoned (and the Court of Claims did not purport to abandon it), there must be, at the least, some authority in the agency to seize or requisition the particular property.

Hatahley has no bearing on this problem. That case arose under the Federal Tort Claims Act, which imposes liability upon the Government for the torts of its employees "while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act * * * occurred." 28 U.S.C. 1346(b). The Court held the Government liable since "[u]nder the law of Utah, an employer is liable to third persons for the willful torts of his employees if the acts are committed in furtherance of the employer's interests or if the use of force could have been contemplated in the employment." 351 U.S. at 180. In contrast to this principle, which is generally applied in tort law and is

necessary if the doctrine of *respondeat superior* is to be effective, no such rule has been followed in the field of eminent domain. On the contrary, because the authority to requisition property has been granted only with great care and its use has been carefully controlled to prevent abuse, the Government has been held liable only for those takings for which the requisite general authority has been granted. See the cases cited, *supra*, pp. 12-13, 16.

4. Some 160 cases under the same Limitation Order (L-208) are now pending in the Court of Claims.[14] If the rulings in the instant cases are left standing, the Government's total liability will probably be measured in terms of thirty to sixty million dollars. Moreover, the general constitutional problem of when "regulation" turns into "taking" is of ever-present concern during a span of war or emergency,[15] and, in view of the prevailing opinions below, it would be well to have, at this time, more authoritative guidance which will be useful in current planning for future periods of stress, as well as in the actual operation of controls in times of emergency. It will also be most helpful to have a definitive ruling on the extent of the jurisdiction of the Court of Claims where an administrative seizure is unauthorized.

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[14] Subsequent to the denial of certiorari in *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C.Cls. 18, certiorari denied, 341 U.S. 948, *supra*, Congress, by the Act of July 14, 1952, 66 Stat. 605, authorized the Court of Claims to hear and render judgment on the claims of the gold mine operators, without regard to the statute of limitations.

[15] See, *e.g.*, *Block* v. *Hirsh*, 256 U.S. 135; *Marion & Rye Valley Railway* v. *United States*, 60 C. Cls. 230, affirmed, 270 U.S. 280; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U.S. 456; *Hamilton* v. *Kentucky Distilleries and Wine Co.*, 251 U.S. 146; *Yakus* v.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MELVIN RICHTER,
Attorney.

OCTOBER, 1956.

United States, 321 U.S. 414; *Bowles* v. *Willingham*, 321 U.S. 503; *Lichter* v. *United States*, 334 U.S. 742; *United States* v. *Peuree Coal Co.*, 341 U.S. 114; *United States* v. *Caltex (Philippines), Inc.*, 344 U.S. 149.

In the United States Court of Claims

(Decided February 20, 1956)

No. 49468

CENTRAL EUREKA MINING COMPANY (A CORPORATION) v. THE UNITED STATES

No. 49486

ORO FINO CONSOLIDATED MINES, INC. v. THE UNITED STATES

No. 49693

ALASKA-PACIFIC CONSOLIDATED MINING COMPANY v. THE UNITED STATES

No. 50182

IDAHO MARYLAND MINES CORPORATION v. THE UNITED STATES

No. 50195

HOMESTAKE MINING COMPANY v. THE UNITED STATES

No. 50214

(1) BALD MOUNTAIN MINING COMPANY, (3) ALABAMA-CALIFORNIA GOLD MINES COMPANY, (5) CONSOLIDATED CHOLLAR GOULD & SAVAGE MINING COMPANY, (7) ERMONT MINES, INC. v. THE UNITED STATES

Mr. Phillip Barnett for Plaintiff Central Eureka Mining Company. *Messrs. Ralph D. Pittman* and *Rodney H. Robertson* were on the brief.

Mr. John Ward Cutler for Plaintiffs Oro Fino Consolidated Mines, Inc., Bald Mountain Mining Company, Consolidated Chollar Gould & Savage Mining Company and Ermont Mines, Inc.

Mr. O. R. McGuire, Jr., for Plaintiff Alaska-Pacific Consolidated Mining Company. *Messrs. Hogan & Hartson* and *V. A. Montgomery* were on the brief.

Mr. George Herrington for Plaintiff Idaho Maryland Mines Corporation. *Messrs. Orrick, Dahlquist, Herrington & Sutcliffe* were on the briefs.

Mr. Edward W. Bourne for Plaintiff Homestake Mining Company. *Messrs. James D. Ewing, Eugene Z. Du Bose, Edward E. Rigney, J. Kenneth Campbell* and *James W. Misslbeck* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant. *Mr. Thomas H. McGrail* was on the brief.

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiffs were, at the times herein mentioned, the owners and operators of gold mines. On October 8, 1942, the War Production Board issued Limitation Order L–208 requiring certain so-called non-essential mines to close down and cease all mining operations, or any other operations in and about the mines, except to the minimum amount necessary to maintain the mines safe and accessible. Violations of the order were punishable by fine and imprisonment. By its terms, the order suspended for the life of the order the right of plaintiffs to mine and sell gold.

It is plaintiffs' contention that this action by the Government amounted in law to a taking, for a public purpose, of their right to make profitable use of their mining properties for which just compensation is due them under the Fifth Amendment to the Constitution. In the alternative, the plaintiffs contend that by virtue of the jurisdiction conferred on this court by the special jurisdictional act of July 14, 1952, 66 Stat. 605, they are entitled to recover for the closing of their mines the amount of losses incurred as a

result of Order L–208. It is plaintiffs' position that in the absence of the special jurisdictional act, this court would not have jurisdiction to render a judgment in favor of a gold mine owner for losses incurred unless they could establish a compensable taking, but that the act conferred on this court jurisdiction to render judgment for such losses where they resulted from the issuance of L–208.

Following denial by this court of the Government's motion to dismiss the petition in the case of the *Idaho Maryland Mines Corp.* v. *United States* [1952], 122 C. Cls. 670, the instant cases were consolidated for trial before a commissioner of the court on the question of the Government's liability, the question of just compensation or the amount of damages being reserved for further proceedings.

By the time L–208 was issued by the War Production Board, on October 8, 1942, the President had delegated to that Board all allocation, priorities and requisitioning powers granted to him by Congress,[1] except the power to requisition real property. In general, the purposes to be

[1] The Act of June 28, 1940, 54 Stat. 676, as amended by the Act of May 31, 1941, 55 Stat. 236, as further amended by Title III of the Second War Powers Act of March 27, 1942, 56 Stat. 177, gave to the President priorities and allocation powers and the authority to delegate such powers. Section 9 of the Selective Training and Service Act of September 16, 1940, 54 Stat. 885, 892, gave the President the power to place mandatory orders for products or materials required for the national defense, and provided for the payment of just compensation for such products, or as rental for any facilities or plants used by the United States. The Act of October 10, 1940, 54 Stat. 1090 authorized the President to take over for use or operation any military or naval equipment, etc., held for export purposes but whose exportation had been denied by law, and provided for payment of just compensation. The Act of October 16, 1941, 55 Stat. 742, authorized the President to requisition all other military or naval equipment not held for export. This act was amended in Title VI of the Act of March 27, 1942, *supra*, to eliminate the requirement that only equipment and machinery not in actual use by the owner could be requisitioned. Section 120 of the National Defense Act of 1916, 39 Stat. 213, authorized the President to place mandatory orders for the production of materials required for defense and for the seizure of plants refusing to cooperate. All of these acts provided for the payment of just compensation for any interest taken. The President delegated all the above authorities to the War Production Board or its predecessors in a series of Executive Orders as follows: Executive Order 8572, October 21, 1940, as amended by Executive Order 8612, December 15, 1940 (the Priorities Board); Executive Order 8629, January 7, 1941 (Office of Production Management); Executive Order 8875, August 28, 1941 (OPM and SPAB); Executive Order 8891, September 4, 1941; Executive Order 8942, November 19, 1941; Executive Order 9024, January 16, 1942 (WPB); Executive Order 9040, January 24, 1942; Executive Order 9125, April 7, 1942; Executive Order 9138, April 17, 1942; by Executive Order 9139, April 18, 1942, the President established the War Manpower Commission and transferred to it the labor supply functions of WPB's Labor Division.

accomplished through the exercise of those powers were to increase production of raw materials and finished products needed for the national defense through the mobilization of the material resources and the industrial facilities of the nation. The Board's power to regulate the production and supply of materials, equipment and facilities necessary for the national defense was broad and was, in general, accomplished by the use of various orders, the most common of which were the "P" or priorities orders, the "M" or materials orders, and the "L" or limitation orders. "P" orders were usually addressed to buyers of materials, etc., and authorized them to attach to their purchase orders a symbol entitling them over other users to a certain preference in delivery. "M" or materials orders were allocation orders addressed to the manufacturers or distributors of materials. These orders were used to limit and define the use or the distribution of the particular material which was the subject of the order. "M" orders might also prohibit producers or distributors of certain materials or products from selling them to any buyer unless that buyer had a certain preference rating. "L" or limitation orders, were also related to the Board's allocation functions and were issued to curtail or prohibit the manufacture of end products which required the use of specified critical materials.

The mining industry, along with other industries, was subject to regulation of its acquisition and use of materials, supplies and equipment needed in the defense effort. A general repair order known as P–22 was issued on September 9, 1941, which authorized a variety of industries, including the mining industry, to use only the lowest preference rating, i. e., A–10, to acquire the materials needed for the repair of their mining property and equipment. On September 17, 1941, Preference Rating Order P–56 granted an A–8 preference rating to so-called recognized mining enterprises to acquire materials needed by them for operating supplies and for the maintenance of the mines' property and equipment. This order represented the first special treatment accorded to gold mines as distinguished from other types of mines, in that placer gold mines were expressly excluded from any benefits under the order. Lode gold mines were permitted the use of the A–8 rating because it was recognized

that denying to them repair and maintenance supplies would cause depreciation of their installed equipment and structures, and because many lode mines produced metals other than gold which were useful to the defense effort.

As the critical materials supply situation became more acute, the Office of Production Management [2] found it necessary to take action that would insure a sufficient amount of new and repair parts for the mines producing critical raw materials, and in order to do this it eventually became necessary to deny to mines whose production was predominantly gold the right to purchase any new machinery for use in that production, and to limit such gold mines to the lowest preference rating for the acquisition of maintenance, repair and operating supplies. Accordingly, on December 18, 1941, Preference Rating Order P–100 was issued granting the mines an A–10 or the lowest possible preference rating. On March 2, 1942, Preference Rating Order P–56 was amended to revoke the serial numbers of all gold mines whose total dollar production was more than 30 percent gold. Without a serial number, a gold mine could not acquire any materials needed for operating supplies, or supplies for the maintenance of their property and equipment. Over two hundred gold mines, including those of most of the plaintiffs herein, never again received serial numbers under Order P–56 and thus, by March 1942, a series of progressively more stringent regulations had virtually eliminated any opportunity for the gold mines to acquire critical materials and supplies needed for the national defense.

No agency of the Government was ever granted any real power to control civilian manpower during the war. However, the War Production Board found it necessary to take into consideration manpower problems obviously inherent in the overall problem of increasing the production of vital raw materials and finished products necessary for defense. Shortly after the establishment of WPB's predecessor agency, the Office of Production Management, an operating division known as the Labor Division was established in OPM to study and keep abreast of the labor requirements for national defense and to advise and collaborate with the

[2] At this time the Office of Production Management was still in existence. It was not succeeded by WPB until January 1942.

other divisions of OPM on all matters affecting labor.[3] In the summer of 1942, the Labor Division of what was now WPB, became concerned with the seriously increasing shortage of hardrock or underground miners in the vital nonferrous metal mines, particularly in the copper mines. This concern was shared by the recently established War Manpower Commission and by the War Department which had become alarmed by the growing shortage in the output of copper. Upon investigation, these groups found that the exodus from the strategic metal mines was the result of the higher wages and better working conditions available to the miners in the aircraft and shipbuilding industries and on the armed services building construction projects frequently being carried on in the vicinity of the copper mines. It was also determined that a large number of experienced miners were being drafted into the armed services and Selective Service was adverse to granting deferments to such workers. Despite the urgings of mine employers and the government agencies involved to miners to stay on the job, the strategic metal miners continued to leave the mines for the more attractive job opportunities offered by other defense industries. Production was also hampered by the generally low morale of the miners, the short workweek in the mines, and the lack of any effective means of recruiting workers for work in the strategic metal mines.

During this same period the gold mines were losing experienced miners by virtue of the same circumstances, except that working conditions in many of the gold mines were good, many of the miners owned their own homes, and gold mining was often a family tradition from which they would not readily depart.

Based on 1940 and 1941 statistics furnished by the Bureau of Mines, the War Department, the War Manpower Commission and the War Production Board's Labor Division determined that if the gold mines could in some way be closed down, several thousand hardrock miners would immediately become available for work in the nonferrous metal mines, although no one was quite sure how they could be induced to go to work in such mines since no one had author-

[3] OPM Regulation 5, March 18, 1941, 6 F. R. 1598, 32 CFR 2875—1941 Supp.

ity to require them to do so. A survey by WPB's Mining Division revealed that the labor figures arrived at by the Labor Division were unduly optimistic and that the probable number of hardrock miners employed in gold mines was much smaller than the estimate based on the 1940 and 1941 figures; that, after taking into consideration the number of hardrock miners who would be necessary to maintain the closed mines in safe condition, and the number who were elderly men and home owners and thus unlikely to leave their homes unless forced to do so, a relatively small number of experienced miners would be thrown on the labor market for any purpose. The conclusions of the Mining Division were reinforced by data supplied by representatives of the larger gold mines who came to Washington to confer with officials of WPB and the Army, and also by Congressional Representatives of the mining States. Everyone involved in the ensuing controversy was aware that there was no power in any arm of the Government to force gold miners to work in the nonferrous metal mines, and no way to deny to gold miners opportunities to work in the same war industries or on the same armed services' construction projects that had been luring the nonferrous metal miners away from their jobs in the mines. Selective Service could not bring itself to grant deferments to miners. The Army indicated that it might furlough some four thousand soldiers who had mining experience, and condition their furloughs on their staying on the jobs in the nonferrous metal mines. But the Army was reluctant to grant those furloughs while the gold mines were still operating. Army officials were furnished with facts and figures showing that few hardrock miners would be released by the closing of the gold mines and that there was no way of compelling those miners to work in the copper mines and little likelihood that they would do so. Despite this, officials of the Army continued to bring great pressure to bear on the War Production Board to close down the gold mines, indicating that otherwise WPB would not be doing its part to increase production in the nonferrous metal mines. The Army's objection to the continued operation of gold mines appears to have been largely political rather than practical. Its reluctance to furlough trained soldiers was understandable, but the fact remains that it

was the only governmental agency which had sufficient control over manpower to compel persons under its jurisdiction to work in the nonferrous metal mines and continue to do so.

Over the vigorous objection of informed persons in and out of the War Production Board, the Board on October 8, 1942, issued L–208 which ordered the complete shutdown within 60 days of all the country's gold mines which did not produce sufficient strategic metals to warrant their holding serial numbers.

Within a relatively short time it became apparent that the closing of the gold mines was doing little to relieve the shortage of hardrock miners in the strategic metal mines. In fact, the record indicates that no more than 100 gold miners went into other mines and remained there for a year or more. Despite numerous appeals and a desire on the part of WPB officials to modify the order to permit the gold mines to operate at least on a break-even basis, the order was continued in effect and unchanged until the summer of 1945.

The record establishes that no one having anything to do with the issuance of L–208 believed that it was devised or intended to be devised for the purpose of conserving critical materials, equipment or supplies, inasmuch as existing preference orders had solved that problem in connection with the gold mines. Although WPB had full power to requisition any large inventories of supplies, materials, and equipment owned by the gold mines, or to authorize more essential users of such materials to place mandatory orders with the gold mines, no such power was ever exercised. In L–208 WPB did not even attempt to assure that those critical materials, equipment and facilities would be held for possible future requisition or order, but left the owners free to sell them to anyone they pleased, whether the prospective purchaser was engaged in essential defense work or not.

The record establishes that the purpose and intent of WPB in issuing L–208 was to deprive the gold mine owners and operators of the right to use their properties in the only way they could be beneficially used, i. e., to mine and sell gold for a profit, and that this was done in the unfounded hope that the underground workers thus deprived of their employment in the gold mines might seek employment in the nonferrous metal mines. The record fails to establish that

the prohibition of gold mining was reasonably calculated to or in fact did increase the country's war efficiency.

The following contentions were made in the Homestake brief and were adopted in general by all the other plaintiffs. After discussing those contentions and disposing of them, we shall take up separately the applicability of the conclusions reached to each of the plaintiffs.

Plaintiffs contend that L–208, while in form a regulation restricting their acquisition and use of critical materials needed for defense, was in substance a requisition or taking, for the life of the order, of plaintiffs' right to make profitable use of their gold mining properties for which taking the Government is liable to pay just compensation under the Fifth Amendment to the Constitution. Plaintiffs also contend that if the court should decide that L–208 was actually a regulation in substance as well as in form, it was arbitrary in that it went far beyond what was required by the exigencies of the war situation existing at the time of its issuance, bore no reasonable relation to its ostensible purpose of conserving critical materials needed in the defense effort, and in fact and law amounted to a taking of valuable property rights of plaintiffs for which just compensation should be paid.

The Government contends that regardless of how much damage plaintiffs may have suffered by virtue of their compliance with the provisions of L–208, the order was a proper exercise of the statutory regulatory powers over critical materials by the War Production Board; that it was issued to prohibit plaintiffs' use of those materials in a manner detrimental to the public safety in wartime; that the Government made no use of plaintiffs' property nor did the order represent any positive invasion of any of plaintiffs' property rights, and that no direct benefits accrued to the Government from the imposition of the order except the negative benefit arising from the prohibitions placed on plaintiffs' use of their property. Defendant urges that under these circumstances, plaintiffs' losses are no more compensable than were the losses suffered by the St. Regis Paper Company from the imposition on it of War Production Board General Preference Order M–251 (*St. Regis Paper Co.* v. *United States*, 110 C. Cls. 271; cert. den. 335 U. S. 815), or the losses

suffered by landlords who complied with wartime rent control regulations (*Bowles* v. *Willingham*, 321 U. S. 503, *Block* v. *Hirsh*, 256 U. S. 135, *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170). Defendant also contends that if WPB acted arbitrarily and without good cause in issuing L–208, then the order was unauthorized and illegal and the Government is not liable to pay just compensation for losses occasioned by the unauthorized act of its agents, citing *Hooe* v. *United States*, 218 U. S. 322 and *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330. Defendant suggests that in this latter circumstance, plaintiffs should have refused to obey the order (*Morrisdale Coal Co.* v. *United States*, 259 U. S. 188); or they should have brought injunction proceedings against the officials of WPB to prevent enforcement of the order.

Our first problem is to determine the precise nature of the action taken by the War Production Board in its issuance of L–208, i. e., whether that action amounted to a regulation or a taking of plaintiffs' property rights. Next it must be determined whether WPB had the power to do what it in fact did, and finally whether the Government is liable for the injuries caused plaintiffs by the exercise of that power, even though the power was exercised arbitrarily.

The property which plaintiffs contend has been taken from them, and which defendant urges was merely limited in its usefulness to plaintiffs as a consequence of a valid regulation of scarce materials, was plaintiffs' right to make profitable use of their gold mining properties. As pointed out by Mr. Justice Roberts in *United States* v. *General Motors Corporation*, 323 U. S. 373, while "property" as that term is used in the Fifth Amendment certainly means the physical thing with respect to which the citizen exercises rights recognized by law, it also means the group of rights inhering in the citizen's relation to the physical thing, as the rights to exclusively possess, use and dispose of the physical thing. In this sense, the right of a gold mine owner to extract gold from his mine and to sell it for a profit, is a property right protected by the Constitution. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.

In order to determine whether that property right was "regulated" or "taken," or was merely injured as a conse-

quence of a regulation or of a taking of some other property or property right of plaintiffs, we turn to the limitation order itself and to the facts and circumstances of record surrounding its issuance.

The order was issued on October 8, 1942, by the War Production Board which had succeeded to all the powers and functions of the old Office of Production Management and the Supply Priorities and Allocations Board. The preamble to L–208 reads as follows:

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

The statutory authority cited at the conclusion of the order was section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended,[4] which granted to the President the power to establish priorities and to allocate materials. The President's allocation powers were expressed in the following language (56 Stat. 178), which it will be noted, closely resembles the above quoted language in the preamble of L–208:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

As further authority for its issuance, the order cited Executive Order 9024 (January 16, 1942) abolishing SPAB and establishing the War Production Board, Executive Order 9040 (January 24, 1942), abolishing the Office of Production Management and transferring to WPB all of its duties and powers along with those of the old SPAB, and providing that WPB should perform the functions and exercise the authority vested in the President by section 120 of the

[4] Act of May 31, 1941 (Pub. Law 89), 55 Stat. 236; Act of March 27, 1942 (Pub. Law 507), 56 Stat. 177.

National Defense Act of 1916 (39 Stat. 312). Section 120 of the last mentioned act provided that the President in time of war might, through the head of any Government department or agency, place mandatory orders with individuals, firms, associations, etc., for products produced by them; that if there was a refusal to make or sell at a reasonable cost any product required in response to such mandatory orders, the President, through the head of any department, might take immediate possession of the plant. The section provided for the payment of compensation for any product or material acquired by mandatory orders, or as rental for the use of the manufacturing plant. Executive Order 9125, April 7, 1942, also cited in L–208, contained the President's delegation of his allocation and priority authority to WPB pursuant to Title III of the Second War Powers Act of 1942, 56 Stat. 176.

Order L–208 provided that for the purposes of the order all gold placer or lode mines located in the United States or its territories or possessions which did not hold serial numbers under Preference Rating Order P–56 were deemed "nonessential mines".[5] The order then required such nonessential gold mines to do the following: (1) to close down as soon as possible after the issuance of the order; (2) to cease acquiring, consuming or using any material, facility or equipment for the purpose of breaking any *new* ore or for the purpose of carrying on any development work; (3) on or after 60 days from the issuance of the order, to cease acquiring, consuming or using any material, facility or equipment to remove *any* ore or waste from the mine, above or below ground, or to conduct any other operation in or about the mine except to the minimum amount necessary to maintain the buildings, machinery and equipment in repair, and the mine's access and development workings safe and accessible; (4) to refrain from using any preference rating to acquire any material or equipment for consumption or use in the operation, maintenance or repair of the mines covered by the order, except with the permission of the Director General for Operations. The order provided that the Direc-

[5] This provision had the effect of including in the operation of the order all mines whose gold production in dollar value exceeded 30 percent of its total production.

tor General for Operations, WPB, might assign preference ratings only for obtaining the minimum amount of material needed to maintain the nonessential gold mines in safe condition during the closedown. Violations of the provisions of the order were made a crime punishable by fine or imprisonment. The order provided that persons affected by the order might appeal to the Board by letter and that the Director General for Operations might thereupon take such action as he might deem appropriate.

The preamble to the order, the authority cited at the end thereof, and the prohibition placed upon the acquisition of critical materials, indicate that the order was merely intended to allocate *away from* the so-called nonessential gold mines materials, equipment and facilities which were in short supply and needed for defense. A study of the balance of the order, particularly in the light of certain facts of record, persuades us that the order was not intended to be an allocation order. Insofar as the order prohibited the acquisition of materials, equipment and facilities, certain existing orders, P–56 and P–100, already prevented the acquisition by the gold mines of any such materials except, in the case of P-100, where gold mines did have the lowest priority rating in existence for repair parts, and that could have been revoked. The record establishes that the gold mines, particularly the Homestake mine, had on hand in October 1942 large amounts of materials, equipment and facilities needed in the mining of gold and that Homestake, and some of the others whose circumstances we shall discuss separately, could have continued operations with such inventories for a considerable period after October 8, 1942. L–208 did not in fact "allocate" any of such materials, equipment or facilities away from the mines but, on the contrary, left the mine owners and operators free to dispose of them in any manner they saw fit, by delivering or selling them to nonessential users or by keeping them in the mines. What the order did do, and do directly, was to prohibit the continued operation of the gold mines.

A comparison of L–208 with General Preference Order M–251 which was involved in the *St. Regis* case, *supra*, may aid in evaluating the Government's contention that the two orders were alike in their purpose, operation and effect, and

that the loss of the gold mine owners' right to make profitable use of their mining properties was merely a consequential injury resulting from a valid allocation of critical materials away from the mines in the same way that the injury to the paper company's right to do business was the consequence of a valid allocation of pulpwood away from the company.

The preamble to the St. Regis Order, M–251, was in all material respects identical with the preamble of the gold order, L–208.[6] The order was issued on October 19, 1942, ten days after the issuance of the gold order, and the authority cited for its issuance was identical with that cited in the gold order.

Order M–251 provided that in areas declared by WPB's Director General for Operations to be shortage areas, the Director General could allocate the available supply of pulpwood held or accumulated in that area away from and to specific persons; that he could direct the holders of pulpwood in the area to maintain their accumulations of pulpwood *available for disposition* by the Director General who might direct the delivery of specific quanties of such accumulated pulpwood to specific persons. The Director General was authorized to direct that no one in the area might acquire, consume, process or deliver any pulpwood of the types defined, and which were held or accumulated in the area, *except as the Director General might order.* The Director General was also authorized to require the manufacture of particular types of woodpulp or other wood products by manufacturers. On October 23, 1942, this order was applied specifically to the St. Regis Paper Company and that company was forbidden to acquire, consume, process or deliver any pulpwood, except on authorization or by direction of the Director General for Operations of WPB. Immediately upon issuance of the order to St. Regis, that company was directed by the Director General to deliver during the month of November its entire inventory and supply of pulpwood to

[6] General Preference Order M–251 contained the following preamble:

"The fulfillment of requirements for the defense of the United States has created in certain areas and is expected to create in other areas a shortage in the supply for defense, for export and for private account, of wood for pulp and lumber, and has created a shortage in the supply for defense, for export and for private account of various materials and facilities required for the production of pulpwood; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense."

specified persons "at regularly established prices and terms", subject to OPA regulations. St. Regis was permitted to continue processing and manufacturing its customary products from pulpwood during the balance of October. Although the order did not direct plaintiff to close its factory and plaintiff was left free to make any use of its factory it could, its inability to secure pulpwood resulted in the closing of the mill, plaintiff having decided that it was not feasible to convert its facilities to some other type of manufacturing that would not require the use of pulpwood.

In its suit in this court, the St. Regis Paper Company contended that M–251 amounted to a temporary taking of its paper factory and of its right to do business. Although it was not made an issue in the case, M–251 probably did amount to a taking of plaintiff's inventory of pulpwood (cf. *Edward P. Stahel & Co., Inc., et al.* v. *United States*, 111 C. Cls. 682, cert. den. 336 U. S. 951), but plaintiff did not sue for the taking of its pulpwood, probably because shortly after the order was issued plaintiff received what it considered to be just compensation on the mandatory sales to the Government's designees pursuant to M–251. The court held that M–251 did not require the closing of plaintiff's plant nor did it interfere with plaintiff's use of the plant; that, on the contrary, the order represented a valid exercise of WPB's admitted power to allocate a scarce material such as pulpwood, and that any injury to plaintiff's profitable use of its plant, or any loss in value of its plant, were merely consequential and therefore did not amount to a taking and were not compensable. The terms of the order itself certainly bore out the court's conclusion since the order merely represented an attempt by the Government to secure all the available supply of pulpwood in the area by freezing the supplies on hand with the owners in the area and immediately placing mandatory orders directing delivery to specified users elsewhere, and by prohibiting the users in the area in question from acquiring any more pulpwood.

Like M–251, the gold order prohibited the acquisition, consumption or use of certain personal property used in the mining of gold. L–208 did not, however, require the gold mine owners to hold for the use or disposition of the Government their inventories and supplies of the personal prop-

erty covered by the order but left the owners free to use that personal property in any way they wished except in the mining of gold. The plaintiffs might have sold their inventories of machinery, supplies and equipment to any user whether or not that user was conducting a business which was essential to the defense effort. The record establishes that the Government did not intend to, nor did it ever, requisition any of this personal property or direct the mine owners to sell it to anyone else. From the language of the order itself and from the circumstances surrounding its promulgation, it is apparent that its only purpose was to deprive the gold mine owners and operators of their right to make use of their mining properties.

Since the subject matter of L–208 was the gold mine owners' right to make use of their gold mines and was not the materials equipment and facilities they had on hand and in which the Government apparently had little interest, the next question is whether L–208 amounted to a "regulation" of that property right or to a "taking."

"Regulation" implies a degree of control according to certain prescribed rules, usually in the form of restrictions imposed on a person's otherwise free use of the subject matter of the regulation. Where the restrictions imposed are temporary and narrow, and where the persons on whose property the restrictions are imposed are assured an opportunity to receive "reasonable" compensation as determined by an impartial arbiter, the courts have held that enforcement of such regulations has not deprived the owner of the regulated property of due process, nor has it resulted in the "taking" of a property right in the constitutional sense. Typical of this type of regulation are the rent control regulations referred to above, regulations issued under the renegotiation statute (*Lichter* v. *United States*, 334 U. S. 742) limiting the right to make excessive profits on war contracts, and restrictions imposed in mortgage moratorium legislation (*Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398). On the other hand, where the restrictions imposed by the so-called regulations are so broad that the owner of the property regulated is deprived of most or all of his interest in the property, for all practical purposes there has been a

taking of that property. *Louisville Bank* v. *Radford*, 295 U. S. 555.[7]

The case of *Edward P. Stahel & Co., et al.* v. *United States*, referred to earlier herein, has much in common with the issues raised in the instant controversy as well as with those involved in the earlier case of *St. Regis Paper Co.* v. *United States*, *supra*. In the *Stahel* case, as in the others, plaintiffs alleged that an order of the Office of Production Management (predecessor agency to the War Production Board) though in form a regulation, operated in such a manner as to take valuable property rights of plaintiffs without payment of just compensation. The order in question was General Preference Order M–22 issued on October 16, 1941. M–22 prohibited the owners of raw silk, including the plaintiffs, from selling or delivering their silk to any user but the Government or persons designated by the Government, and further provided that any orders placed with such owners by the Government or its designees had to be accepted and filled. The order did not prohibit the acquisition of raw silk by plaintiffs. Some two months after the issuance of M–22, the Government and its designees began placing mandatory orders with plaintiffs for the silk which was paid for, upon delivery, at the OPA price. Plaintiffs sued for additional compensation for the silk, alleging that the "taking" had occurred on the issuance of General Preference Order M–22 on October 16, 1941, and that, accordingly, they were entitled to recover an additional amount to compensate them for delay in payment, plus amounts expended for storage and handling of the silk after October 16, 1941, until

[7] *The Home Building & Loan Association* case, *supra*, involved the constitutionality of a Minnesota statute which, in time of economic depression sought to relieve the plight of needy mortgagors by providing for a possible extension of the redemption period of their mortgaged property. Citing the many safeguards contained in the statute to protect the rights of the mortgagee and the fact that the mortgagee would ultimately receive all that he was entitled to under the mortgage, the Court upheld the statute as a *limited* and *temporary* restriction on the mortgagee's right to enforce his contract, such restriction being justified by the great public calamity, i. e., the depression. This case was relied on by the mortgagor, Radford, in *Louisville Bank* v. *Radford*, *supra*, to uphold the constitutionality of the Frazier-Lemke Act of 1934, which also sought to relieve the plight of needy mortgagors during the depression. The Supreme Court held that the restrictions imposed by the federal act were neither limited nor temporary and that they amounted to a taking of valuable property rights of the m rtgagees without any compensation whatsoever.

the silk was finally delivered to and paid for by the Government or its designees. The Government contended that M–22 was merely a regulation which placed certain limitations or restrictions upon plaintiffs' right to sell their silk and that these limitations were imposed in the proper exercise of the sovereign's lawful power to allocate scarce materials in wartime *away from* nonessential to essential users, and that while the restrictions imposed in the interest of the defense effort may have decreased the value of the silk to the plaintiffs, the silk was not taken on October 16, 1941, citing *Omnia Commercial Company, Inc.* v. *United States*, 261 U. S. 502, *Bowles* v. *Willingham*, 321, U. S. 503.[8] The Government pointed out that on October 16, 1941, when the order was issued, the Government did not take any positive action regarding plaintiffs' property which, on the contrary, was left in the possession and control of the plaintiffs subject only to the negative power of the Government evidenced by the restriction that it might not be sold or delivered to anyone but the Government or its designees. The court held that the restrictions imposed by M–22 on plaintiffs' use of its silk were so broad that, for all practical purposes, plaintiffs were deprived of their silk; that although the silk did remain in the actual possession of the plaintiffs after October 16, 1941, it was held not for their own use but for the use of the Government whether the Government ever exercised its right under the order to demand delivery of the silk or not.[9] The court noted that the Government had the statutory power to requisition plaintiffs' silk and pay just compensation therefor on October 16, 1941, and held that the

[8] In the *Omnia* case the Government had requisitioned the entire output of steel by the Allegheny Steel Company and had directed the company not to comply in that year with any contract calling for steel. The Omnia Commercial Company had a contract with the Allegheny company entitling Omnia to Allegheny's steel at a price well under the market. Omnia sued the United States alleging that the Government had "taken" its right to have its contract with Allegheny performed. The court held that the contract had not been taken but only its performance frustrated and that Omnia's loss of the expected profit was a consequential loss resulting from lawful governmental action of requisitioning Allegheny's steel. In the *Bowles* v. *Willingham* case the Supreme Court held that rent control imposed only temporary and narrow restrictions on an owner's use of his property.

[9] In its motion for a new trial which was denied, the Government pointed out that under the court's decision a holder of silk on October 16, 1941, who had never received a mandatory order for any of its silk, would still be entitled to the same compensation as the holder who sold all of his silk on mandatory orders.

Government's choice of a general preference regulation as a means of acquiring the use of plaintiffs' property in preference to a formal requisition did not deprive the operation of M–22 of its character of a taking, or lessen plaintiffs' constitutional right to just compensation. Plaintiffs' recovery included an additional amount to compensate them for delay in payment, plus amounts expended by them in handling and storing the silk after October 17, 1941.

It seems to us that the restrictions placed by L–208 on the right of gold mine owners to mine and sell gold were neither conditional nor limited and were as complete as were the restrictions placed on plaintiffs' silk in the *Stahel* case. In neither the *Stahel* case nor the instant case did the Government, through the orders issued, attempt to vest in itself title to the subject matter of the orders, or to assert any proprietary rights in the subject matter. In both cases the orders merely sought to impose certain negative restrictions on the otherwise free use of their property by the owners. If plaintiffs' silk was taken by M–22 because that order served to deprive plaintiffs of all beneficial use of their silk, regardless of the fact that physical invasion of the property right was merely threatened in the order and might never have taken place, it would seem to follow that L–208 was equally a taking of the right of the gold miners to make profitable use of their mining properties by mining and selling gold.[10] It also appears that the loss of the gold mine owners of their right to mine gold was the direct result of L–208 and was not a consequential loss in the sense that it was the result of the exercise of defendant's power to allocate scarce materials, or to take such materials, as was

[10] It is not contended that their right to mine and sell gold was acquired by defendant in the sense that the Government actually took possession of the mines and carried on the business for its own benefit. It is contended, however, that the Government deprived plaintiffs of their right to make profitable use of their mining properties for the period during which the order was in effect and that this deprivation amounted to a taking. That Government action short of acquisition of title or short of physical occupancy may constitute a "taking" in the constitutional sense has been upheld by the Supreme Court. *United States* v. *General Motors, supra; United States* v. *Welch*, 217 U. S. 333; *Richards* v. *Washington Terminal Co.*, 233 U. S. 546. As Justice Roberts pointed out in the *General Motors* decision, it is the "deprivation of the former owner rather than the accretion of a right or interest to the sovereign" which constitutes the taking, and if the effects of the Government's actions are so complete as to deprive the owner of all or most of his interest in his property, that property has been "taken."

plaintiffs' loss in the *St. Regis* case, *supra*, because, as we have seen, L–208 neither allocated nor took plaintiffs' inventory and supply of critical materials, equipment and facilities.

To allocate means to distribute or to assign. Allocation is the act of distributing or of putting one thing to another. Insofar as L–208 prohibited the *acquisition* by gold mine owners of materials, equipment and machinery, the order was allocating the available supply of those items *away from* the gold mines so that there might be more to distribute or allocate to mining enterprises considered to be more essential to the war effort. Insofar as L–208 prohibited the mine owners from using any of the materials, supplies, equipment, machinery and facilities owned by them and on hand, that prohibition allocated nothing, i. e., it distributed nothing because the order contained nothing which required the gold mine owners to sell those items to the more essential users. Furthermore, because the order merely deprived the owners of the machinery, materials, supplies, etc., on hand, of the use thereof for one single purpose, i. e., for the continued mining of gold and left the owners free to otherwise dispose of those items as they pleased, that prohibition did not amount to a "taking" of the materials, equipment, machinery, etc., owned by the gold mine owners and operators. The fact that occasional voluntary sales of idle gold mining machinery were made to some more essential mines does not give to that part of L–208 prohibiting the owners from using those items to mine gold the character of an allocation order; it merely emphasizes the fact that those items were not "taken." But the petitioners herein are not suing for the taking of their machinery, facilities and supplies on hand.

We turn next to a consideration of whether L–208 was in fact a limitation order. Limitation orders were used to supplement priority orders which were not always effective to keep nonessential manufacturers of nonessential products from acquiring critical materials. Such nonessential manufacturers, even with the lowest priority rating, might be able to pick up from time to time a significant amount of critical materials which at a later time might be needed by essential manufacturers. To remedy this situation, limitation orders were directed to the manufacturers of *specified end prod-*

ucts which were considered nonessential in war time, such as office machinery, furniture, bicycles, stoves and passenger automobiles, and they prohibited the manufacture of such end products into the manufacture of which went critical materials.

No critical materials went into the end product of a gold mine, i. e., refined gold. The gold mining industry used critical materials only for the maintenance, repair and operation of the mines. If it had been the sole purpose of WPB to prevent gold mines from *acquiring* critical materials to a greater extent than they were already prevented by P–56, under which they could acquire nothing because their serial numbers had been revoked, and under P–100 under which they could acquire only limited amounts with their lowest (A–10) priority rating, that part of L–208 which absolutely prevented the acquisition of those materials to operate the mines, effectively did that.

It has been suggested by defendant that a further purpose of a limitation order was to prevent the consumption of critical materials already on hand and owned by a nonessential industry in order to "conserve" such critical materials. The question immediately arises in connection with L–208: In what significant way did L–208 *conserve* such critical materials, i. e., the equipment and machinery and supplies of the gold mines? Presumably something is "conserved" for the purpose of putting it to some more important use, otherwise what is the object of "conservation"? A material may be in short supply but if it is not needed by anyone, it seems hardly a proper object of conservation, and if it is kept idle or saved up, it would appear to be merely hoarded rather than conserved. Also, if something is scarce and is urgently needed by others, it cannot be said to be conserved unless the so-called conservation measure makes some effective provision for getting that scarce and needed material into the hands of essential users. The provision may appear in the same measure or in a supplemental measure. This was not done in L–208 and it was this omission which robs the order of the character of a *bona fide* limitation order.

L–208 was labeled a "Limitation Order", and up to a point it followed the pattern of true limitation orders. But a limitation order has a specific purpose: it is issued to conserve critical materials so that those materials may be used by essential war industries. It is not issued to insure that those critical materials will deteriorate through disuse or be preserved for future use by the nonessential owners thereof. L–208 made specific provision for the gold mine operators to preserve their own critical machinery and equipment so that they, i. e., the nonessential owners, would have that equipment and machinery in good condition for use in gold mining when the limitation order was finally lifted.

Paragraph (b) (3) of L–208 provided that no gold mine operator might acquire, consume or use any critical material, facility or equipment *except to the minimum amount necessary to maintain the gold mine's buildings, machinery and equipment in repair and its access and development workings safe and accessible.* Paragraph (c) of the order authorized the Director General for Operations of WPB to assign such preference ratings as might be required to gold mine operators to enable them to obtain the minimum amount of critical materials necessary to maintain their nonessential mines on the basis set forth in subparagraph (b) (3), i. e., to keep their machinery and equipment in repair, *inter alia.*

The above makes it quite clear that the "conservation" brought about by L–208 with respect to the mining machinery and equipment owned by the mine operators was not the usual conservation purpose of a limitation order of WPB, i. e., conservation so that the equipment, machinery and materials owned by a manufacturer of nonessential products might be converted to the manufacture of essential end products either by the owner or by some manufacturer of an essential end product. Any actual conservation intended and brought about by that part of L–208 which prohibited the use of the gold mine owners' equipment and machinery for the mining of gold was for the purpose of conserving that equipment and machinery for future use by the nonessential gold mines in the production of nonessential gold.

In summary, it appears to us that only to the extent that L–208 prohibited the *acquisition of new materials and equip-*

ment was that order either a limitation or an allocation order. The balance of the order, having to do with the prohibition of the consumption and use of materials, equipment and machinery owned by the mines and on hand, in the operation of the gold mines, was not intended to and could not, under the very terms of the order itself, accomplish any of the purposes of allocation or limitation orders. Since that prohibition on use of materials and equipment on hand was neither a limitation nor an allocation order, the destruction of the right to mine and sell gold was not consequential to a limitation or allocation order.

L–208 was aimed, in all its provisions, directly at the beneficial use of the mining properties of the gold mine owners, and the only intention reasonably inferrible from the language of the order itself and the circumstances surrounding its issuance was an intent to temporarily deprive them of that property right. By the issuance of Order L–208 the defendant prohibited the carrying on of otherwise lawful mining operations and thereby placed a definite servitude on plaintiffs' profitable use of their mines which resulted in a temporary taking of that property right. See *Peabody* v. *United States*, 231 U. S. 530; *Matthews* v. *United States*, 87 C. Cls. 662, 720.

We come next to the question whether the War Production Board had the necessary authority to issue an order which would have the effect of depriving plaintiffs of their right to make profitable use of their mining properties. The Government contends that if, as argued by plaintiffs, WPB acted "arbitrarily" in issuing L–208, it acted without authority and the Government is not liable to pay just compensation for property destroyed by the unauthorized act of its agents.

While it is true, in general, as urged by defendant, that the Government is not liable for damages occasioned by the unauthorized acts of its agents, the problem of determining whether or not a particular act was "authorized" is not always a simple one.

If the statute under which the Government agent is acting specifically forbids the particular act complained of, that action is clearly unauthorized and the Government will not

be liable for damages resulting from that action. *Hooe* v. *United States*,[11] *supra*.

If an agent of the Government acts without any statutory authority, that action is unauthorized and the Government will not be liable for damages resulting from that action. In such a case the injured person's remedy would be by injunction against the individual government official acting without authority. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579. In that case the President issued an order directing the Secretary of Commerce to take and operate most of the Nation's steel mills. Although there were in existence at that time two statutes authorizing the President to take both personal and real property under certain conditions, the Supreme Court held, and the Government admitted, that those conditions were not met. Furthermore the Court noted that the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment but that Congress had refused to adopt that method of settling labor disputes when it was considering amendments to the Taft-Hartley Act in 1947. The Court further held that not only was there no statutory authority for the seizure or taking of the steel mills, but also there was no constitutional authority for such a taking in that the President had no such inherent power. In the instant case Congress had by legislative enactment given the President authority to take for title or for use both real or personal property or interests therein, and those statutes did not impose "cumbersome, involved, and time-consuming" conditions referred to by the Supreme Court in connection with the statutes referred to in the *Youngstown* case. On the contrary, the conditions imposed by the wartime statutes were simple, and involved (1) that

[11] In the *Hooe* case a federal statute provided that in renting space for Government use, Government officials might not obligate the Government for the future payment of money in an amount in excess of the appropriation. A Government official rented from plaintiff a part of his building at a rental in the full statutory amount, but occupied additional space in the building for which plaintiff was not paid. Plaintiff sued for the additional rent either on the ground of an implied contract or as just compensation for private property taken for public use. It was held that the Government was not liable on either theory since the officer acted without lawful authority when he did anything which tended to commit the Government to pay more rent than the statutory maximum and that in so doing he was not representing the United States.

the taking be *deemed* by the President or his designee to be necessary for the prosecution of the war and (2) that just compensation be paid the owner of the property interest taken. It is true that the wartime statutes under which the President and WPB operated did not specifically authorize the closing of any business as a means of taking over that business. But the closing amounted to a taking and the President and WPB were authorized to take private property when, *in their opinion*, such taking would be in the interests of national defense. We have here then, merely the use by WPB of an unorthodox and perhaps *unauthorized means* of accomplishing an *authorized end* or result, i. e., a taking. And if a taking is authorized by Congress, it is compensable under the Constitution despite the means used to accomplish it, as we shall discuss more fully hereinafter.

Where the agent's actions are not prohibited by statute and where they are within the general scope of his authority, although under general law they may be tortious, the modern trend is to hold such actions to be the acts of the sovereign. This subject was discussed at some length in *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, in which the Court held that the District Court did not have jurisdiction to grant an injunction preventing officials of the War Assets Administration from selling coal to anyone other than the petitioner on the ground that the suit was actually one for specific relief against the Government which had not consented to be so sued. The petition in that case alleged that the War Assets Administration had sold certain surplus coal to the petitioner; that the Administrator for that agency had then refused to deliver the coal to petitioner and had entered into a new contract to sell the coal to others; that the petitioner's contract with the Government was an immediate contract of sale under which title to the coal had passed to the petitioner; that, accordingly, retention of the coal by the Administrator, after demand was a conversion of petitioner's property and the Administrator's actions illegal so that the relief prayed for was not against the Government but against the Administrator individually to enjoin his threatened tortious action. The Supreme Court held that the Administrator had statutory authority to make

decisions concerning the meaning and effect of the contracts he entered into on behalf of the Government, and that such authority included the authority to make incorrect as well as correct decisions, whether of law or of fact; that any action taken pursuant to an incorrect decision was not, *ipso facto*, an unauthorized or illegal act, but might well be the act of the sovereign even where the act involved the wrongful withholding of property belonging to the petitioner, i. e., a conversion. The Supreme Court then held that the action of an officer of the sovereign, "be it holding, taking or otherwise legally affecting the plaintiff's property," could only be regarded so illegal as to permit suit for specific relief against the officer as an individual where that action was clearly outside the officer's statutory powers or where, though within those powers, the powers themselves were constitutionally void. The Supreme Court stated at page 695:

> There is, therefore, nothing in the law of agency which lends support to the contention that an officer's tortious action is *ipso facto* beyond his delegated powers. Nor, we think, is there anything in the doctrine of sovereign immunity which requires us to adopt such a view as regards Government agencies.

The Supreme Court concluded that since the Administrator's tortious actions were taken pursuant to erroneous decisions (of law) which he was authorized to make, he was acting for and as the representative of the Government and not in his individual capacity. The injunction was denied because it would have required specific relief against the Government itself. The Supreme Court suggested that the petitioner's remedy was in the Court of Claims for damages for breach of contract or for just compensation for the taking of the petitioner's coal.

Where a Government agent exercises a statutory power in a manner not provided for in the statute, the courts have held that his action was not "unauthorized" if the result of the action was one contemplated by the statute. In *Hurley* v. *Kincaid*, 285 U. S. 95, petitioner had obtained an injunction in the District Court restraining certain Government officials from proceeding further with the construction of a flood control project then being carried out under the Federal Flood Control Act. It was clear that the continued construc-

tion would necessarily destroy portions of plaintiff's property. The lower court granted the injunction on the ground that the Government officials were acting "illegally" and therefore in their individual capacity in threatening to proceed with the project without first acquiring by formal eminent domain proceedings, as they were specifically required to do by the Flood Control Act, the necessary flowage rights over petitioner's land. The Supreme Court reversed the action of the lower court granting the injunction, on the ground that the acts complained of were the acts of the sovereign and not the individual acts of the officials; that the Flood Control Act authorized the taking of petitioner's land or of an easement therein; that the only "illegality" involved was the failure of the Government officials to compensate petitioner for the land taken and that such a circumstance afforded no basis for an injunction where, as in that case, compensation might be procured by the petitioner in an action at law in the Court of Claims. The Supreme Court held that the Fifth Amendment assured plaintiff of just compensation but that (p. 104, footnote 3) it did not entitle him to be paid the compensation in advance of the taking:

> Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury.

Although the Supreme Court did not characterize as "arbitrary" the action of the Government officials in refusing to institute condemnation proceedings as provided for in the Flood Control Act, it would seem that such action was arbitrary in the same manner that a willful breach of a Government contract by a contracting officer is arbitrary. In neither case, however, are such arbitrary actions "unauthorized" in that they were forbidden by statute or were clearly outside the scope of the powers delegated by statute.

A regulation may be so arbitrary in its application to the particular subject matter and under the circumstances that it actually results in the regulatory body exercising powers not conferred on it by statute. This was the case in *Berwind-*

White Coal-Mining Co. v. *United States*, 9 F. 2d 429. Plaintiffs therein were owners of coal mines and private coal cars. They sought to enjoin the enforcement of an order of the Interstate Commerce Commission relating to the distribution among bituminous coal mines of coal cars during times of car shortages. Enforcement of the order would have prevented the plaintiffs from using their private coal cars. The court observed that the rights of private car use and ownership are recognized by Congress, and that Congress had not delegated to the Commission any power over private car owners or over the soft coal industry. The court held that in issuing the order in question the Commission, through what purported to be an exercise of its regulatory power over carriers, actually abolished the use of private coal cars to a substantial extent and thus deprived the private car owners of the full enjoyment of their rights to operate their mines and supply themselves with coal from other mines. The order of the Commission was held to be unjust and unreasonable and to amount to an unlawfully arbitrary exercise of power which had the effect of regulating that which the Commission had no power to regulate.

It would seem to follow from the above, that the "arbitrary" action of a Government official is not necessarily "unauthorized" and "illegal" if the action represents an exercise of powers delegated to the official by the sovereign.

In the instant case the record establishes that as an order allocating critical materials away from a nonessential user, L–208 was arbitrary and unreasonable. The amount of such materials which were thereby prevented from being delivered to the gold mines was not significantly greater than was already prohibited by existing priority orders, and a simple revocation of those orders insofar as they applied to the gold mines, would have cut off all such deliveries. L–208 did not require the owners of the critical materials to hold the materials they had on hand for the use of the Government or some essential user to be designated by the Government, nor did it require that the owners deliver the materials to such essential users, but rather left them free to dispose of the critical materials in any way or to anyone they pleased. The only use which the gold mine owners were forbidden to make of the critical materials, equipment and supplies which they

owned and had on hand, was in the operation of their gold mining properties. Despite its preamble and the authority cited for its issuance, the language of the order itself and the circumstances surrounding its issuance indicate that neither its purpose nor its effect was to conserve or allocate critical materials, equipment and facilities needed for defense, but was rather to deprive the gold mine owners of their right to make profitable use of their gold mines. Viewed as a taking of that property right, the order was equally arbitrary since the record discloses that those officials responsible for its promulgation either knew or should have known that the only reason for the order, i. e., relieving the manpower shortage in the nonferrous metal mines, would not be accomplished thereby. However, we think that the only "illegality" involved in WPB's arbitrary action was its failure to pay just compensation for the property right of which plaintiffs were deprived, because we believe that WPB had the necessary statutory authority to take this property. By October 1942, Congress had conferred upon the President authority to requisition, place mandatory orders for, or take for title or for use, any real or personal property or interests therein which he deemed necessary to successfully prosecute the war. These statutes left the determination of war necessity to the absolute discretion of the President, but they required the payment of just compensation for any property taken or used. Congress also authorized the President to take possession of factories or other business establishments and to operate them if it was deemed by him to be in the interests of the national defense to do so. All these powers were delegated to the War Production Board except the President's power to condemn real property. Although none of the statutes contained specific language authorizing the requisition of a business in order to keep that business from operating at all, if the Government felt that the idleness of a business would be of benefit to the defense effort but did not believe the business sufficiently evil or dangerous in wartime to justify its closing,[12] we suppose its powers of requisitioning were broad enough to permit such action, subject, however, to the obligation to pay just compensation

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[12] *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146.

to the owner. Neither party has suggested that the Government lacked such power.

Defendant also urges that if, as plaintiffs contend, the only purpose of the order was to divert manpower from the gold mines to the nonferrous metal mines, then the action taken by WPB in issuing the order was unauthorized because the War Production Board had no authority to issue orders affecting manpower.

From our study of the statutes, executive orders and regulations relating to WPB, we think that WPB was authorized to take into consideration the manpower implications of any order it might issue. The relationships between manpower and the consumption of scarce materials, and between manpower and increased production of vital end products, are of too obvious significance in the whole war production situation to suppose that they were not the legitimate concern of the War Production Board. The establishment of the Labor Division early in the life of the Office of Production Management and the presence on the War Production Board itself and on the War Manpower Commission of the Director of the Labor Division, are ample evidence of this concern. While Congress never enacted legislation which gave the Government the power to order a civilian worker to leave one job and go to another, or to order an employer to discharge an emplovee in order that the employee might be hired by someone else, it was no objection to an order of the Government, otherwise valid, that one of the results of its enforcement would be a better utilization of available manpower in the interests of the national defense. That the main objective of the gold limitation order may have been to bring about a shift in the employment of underground gold miners from the gold mines to the nonferrous metal mines is, we think, immaterial on the issue of the order's validity, since the order did not in any of its provisions attempt to exercise authority with respect to manpower and provided no possible basis for any attempted enforcement of the latent manpower purpose.

The only circumstance under which the Government may escape the obligation to pay for property which is destroyed or taken by the authorized action of its agents, is where, in time of war, that property is inherently dangerous, or is be-

ing used in such a manner as to clearly endanger the public safety. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146; *United States* v. *Caltex*, 344 U. S. 149. Gold mines which did not possess a serial number under WPB Order P–56 because they did not produce significant amounts of critical metals in addition to gold, were determined by WPB to be "nonessential," but we know of no precedent which would justify our holding that a nonessential industry or business was, *ipso facto*, one endangering the public safety in time of war. That such an industry could be regulated, and strictly regulated in wartime, is unquestioned, and resulting losses are not compensable if the action taken is truly regulatory in nature. But the power to regulate a nonessential but nondangerous industry in wartime is not the power to destroy, and limitation is not the equivalent of confiscation. *Stone* v. *Farmers' Loan and Trust Co.*, 116 U. S. 307, 331. As the Supreme Court said in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

That the taking of the gold mine owners' right to make use of their mining properties was not in fact necessary to the successful prosecution of the war, and that the officials responsible for the issuance of L–208 either knew or should have known this fact, does not, we think, relieve the Government of its obligation to pay just compensation for the destruction of this right. The statutes and executive orders granting to the Government authority to take property which would aid in the prosecution of the war left to the discretion of those officials to whom the authority was delegated the determination of "war necessity." No tests or procedures were prescribed in connection with the making of that determination and no criteria furnished. That the determination was without foundation would be no defense in a prosecution by the Government of the owner for refusal to give up his property on the Government's demand for it accompanied by a tender of just compensation. Similarly, we think the same lack of wisdom in determining that the Government actually needed certain property which it took

or destroyed would be no defense to the Government in a suit by the owner for just compensation.

That the Government did not make any physical use of the gold mines does not deprive its action of its character of a taking. The Supreme Court has held that *destruction* of private property for a *public purpose* is the equivalent of a *taking* of private property for a *public use*. *United States* v. *Welch*, 217 U. S. 333; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1.

In concluding that L–208 amounted to a temporary taking of plaintiffs' profitable use of their mining properties for which just compensation should be paid, we have had the following considerations in mind. If L–208 had merely denied plaintiffs the right to acquire any materials, facilities or equipment needed to operate a gold mine and, as a result thereof, plaintiffs had ultimately found it necessary to cease operations because of lack of needed materials, new or repair parts, their losses would have been consequential to the exercise by WPB of its lawful regulatory power of allocation in connection with scarce materials and therefore would not have amounted to a taking. If WPB had had the power to allocate civilian manpower from and to industries, and, as a result of its allocation, plaintiffs' mines had been forced to close down, there would similarly have been no taking. If L–208 had not only denied the gold mines the right to acquire materials, equipment and facilities but had ordered the mine owners to cease using what they had on hand, to hold them for the possible use of the Government, and not to dispose of them to anyone but the Government or its designees, such an order would have amounted to a taking by the Government of those materials, facilities and equipment, whether the Government or its designees ever actually took physical possession of them or not, and the loss of the gold mine owners' ability to carry on their business would have been consequential to the taking of the materials, equipment and facilities and would not have been compensable under the Fifth Amendment.

L–208 did not do any of the above things except to deny the gold mine owners and operators the right to acquire additional materials, facilities and equipment. However, the

loss of plaintiffs' right to make profitable use of their mining properties was not, in many cases, the result of that denial. The record establishes that a number of the plaintiffs herein could have operated for a time at least with what they had on hand and without acquiring any additional materials, facilities and equipment which were under Government restriction. How long they could have operated is of importance on the question of damages rather than of liability. But L–208 did not stop with a mere denial of the right to acquire materials, equipment and facilities. The real substance and intent of the order was embodied in the prohibition directed at the continued operation of the gold mines. The so-called limitation on the gold mine owners' use of the equipment and supplies and facilities which they owned was not intended to make those items available to the Government or to the war effort but was expressly included in the order to insure that they would not be used in the mining of gold, and was part and parcel of the express order to cease doing business.

We conclude that L–208 by prohibiting the carrying on of otherwise lawful mining operations placed a servitude on plaintiffs' profitable or beneficial use of their mines and thus amounted to a temporary taking of that property right in the case of those mine owners and operators who were forced to close their mines by virtue of their compliance with those provisions of L–208 which prohibited them from using their materials, facilities and equipment to mine gold and which ordered them to close down their mines. Such mine owners and operators are entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution.

Homestake Mining Company

The Homestake Mining Company is a California corporation. Homestake is and was in 1942 the owner of patented mining claims covering more than 5,000 acres of mining properties containing gold-bearing ores of great value located in the Black Hills area of South Dakota near the city of Lead. For some 65 years prior to October 8, 1942, Homestake had been engaged in the business of mining, proc-

essing and selling gold, and in 1942 it was the largest gold producer in the United States.

The mine was located in an isolated area and was therefore required to observe a policy of self sufficiency. From its early days it maintained larger inventories of supplies and equipment than was customary in most mining enterprises. It owned extensive timberlands which provided lumber needed for the mine. It had developed a coal mine, and it produced all of its own electric power. Prior to the issuance of L–208, Homestake had completed two deep mine shafts and had equipped them with modern hoists. It had also erected a new lumber mill. Its steam power plant was relatively new and its ore processing mills were in excellent operating condition.

The mine maintained its own foundry and machine shops to fabricate and repair a variety of mining and processing equipment. Homestake's inventory of supplies and materials, which it could not make for itself, was sufficient in October 1942, to permit the company to operate its mine during the entire period of the closure. Dynamite, which the company would have had to obtain within a few months, was readily available without restriction.

The working and living conditions at Homestake in 1942 were superior to those of any of the nonferrous metal mines to which the Government hoped to transfer the Homestake miners. Homestake had lost some of its manpower in October 1942, but had it been permitted to continue operations it could have maintained normal production levels by using mining techniques requiring less labor and by increasing its workday from seven to eight hours.

In October 1942, the Homestake mine constituted the largest single source of potential nonferrous metal mining labor, with a total payroll of approximately 1,800 workers of all kinds. Following the closing order, Homestake released 473 men of whom 183 were classified as miners, 39 of whom had had less than six months' experience. The nearest nonferrous metal mines were about 500 miles from the Homestake mine—Anaconda copper mine at Butte, Montana, and the Climax molybdenum mine at Climax, Colorado. Representatives of the United States Employment Service attempted to induce released Homestake workers to accept

employment at those nonferrous metal mines. Fifty-one Homestake employees accepted employment at Climax, 41 staying less than 6 months and only 6 remaining as long as a year. One hundred seventy-eight Homestake employees went to Anaconda and more than 100 left before the end of a year. Between October 8, 1942 and November 12, 1942, the United States Employment Service placed 207 Homestake employees of all kinds in other mining districts. A number of these employees, however, returned to Lead shortly after November 12, 1942.

Prior to October 8, 1942, employment at Homestake had not suffered as had employment in the nonferrous mines and, although some employees had left the mines, most of the old employees stayed on. The reasons for the greater stability of employment in this mine, which constituted the largest single source of experienced miners, were probably the good living conditions, the free medical and hospital service, group insurance, pensions, recreational and other facilities provided for Homestake employees by the company. These conditions were unusual in the mining industry and had no counterpart in the nonferrous metal mines.

After the issuance of L–208, Homestake was permitted to hoist and process ore already broken until the latter part of May 1943. After June 1, 1943, the mine was closed for all except maintenance purposes until July 1, 1945, when the mine was reopened.

Without acquiring new machinery, parts, supplies or other materials, and with a greatly reduced labor force, Homestake could have operated profitably during the entire period of closure.

Although Homestake had a large inventory of supplies and materials, and large amounts of machinery and equipment in good condition, neither WPB nor any other Government agency sought to requisition, purchase or compel the transfer thereof to the Government or to a war industry.

The properties of Homestake were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business. The closing of the mine had far-reaching and drastic repercussions in the city of Lead and in the surrounding communities. The population of Lead declined sharply. More than 750

homes and apartments were left vacant and 36 business establishments which had served the communities were closed. About ten percent of the State's annual revenue derived from Homestake was lost to the State.

We conclude that L–208 amounted to a temporary taking of the profitable use of the Homestake mining properties for which Homestake is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Idaho Maryland Mines Corporation

Idaho Maryland Mines Corporation, a Nevada Corporation, owned in fee certain gold mining properties known as the Idaho Maryland Mines, consisting of approximately 8,000 acres of gold-bearing lands situated in the Grass Valley Mining District in the County of Nevada, State of California, together with all the necessary mining plant and equipment located on those lands.

On October 8, 1942, Idaho Maryland had extensive equipment and facilities for the operation of its mining enterprise, including machine shops, electric shops, welding shops, blacksmith shop, carpenter shop, cyanidation plant and smelting plant, a sawmill and other mills, all the usual automotive and other equipment. It also had on hand a large inventory of supplies and materials necessary for operating the mine, including pipe and rail, steel, drill steel, tires, tubes, repair parts for milling machinery, valves, pipe fittings, mercury, etc. The mine was a fully developed one comprising extended drifts, cross-cuts raises and winzes, fully equipped with modern mechanical equipment. The mine had its own timber supply and its own sawmill. Its electric power was furnished by the Pacific Gas and Electric Company and there was no shortage of electric power at the mine nor was it curtailed during the shutdown period.

Prior to the issuance of L–208, the mine had lost considerable manpower. Its payroll was reduced from 800 employees to 212 employees[13] between December 1941 and

[13] The average age of the 212 employees was 47.7 years. Forty-three of the underground workers were 50 years of age or over.

October 8, 1942. Alterations in mining methods enabled the mine to continue a profitable operation with the smaller force of workers.

With a greatly reduced labor force and without acquiring any critical material, supplies, equipment or facilities subject to Government control, Idaho Maryland could have operated its mining properties on a profitable basis during the entire period of L–208.

The properties of Idaho Maryland were useful for no other purpose than the production of gold. Its various machine shops were not capable of being utilized in the mass production of any item.

The closing of the mine caused considerable community dislocation and individual hardship in Grass Valley, California, which was wholly dependent upon the operation of the gold mine for its continued prosperity. Since 1848, the principal occupation of the inhabitants of the communities of Grass Valley and Nevada City had been gold mining.

On May 3, 1944, Idaho Maryland was permitted by WPB to resume operations on a limited basis to be carried out with a force not to exceed 200 men who were required to be over 40 years of age and not employed by other industries. Production was limited to 7,800 tons of ore per month, but because of the length of time it took to prepare for production and to open up the necessary ground workings after extensive damage caused by the shutdown, Idaho Maryland was not able to produce 7,800 tons a month in 1944. Permission to hire additional labor was denied by WPB on November 24, 1944.

The closing of Idaho Maryland was brought about by reason of compliance with the provisions of L–208 which ordered that the mine be closed and that the owners not use materials, supplies, machinery and facilities on hand to operate the mine. We conclude that L–208 amounted to a temporary taking of the profitable use of the Idaho Maryland mining properties for which Idaho Maryland is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Central Eureka Mining Company

Central Eureka Mining Company, a California corporation, owned approximately 641 acres of gold-bearing land located at Sutter Creek, Amador County, California. On October 8, 1942, the mine had been producing gold for about 80 years. It then employed 117 men of whom 73 were classified as underground workers. The average age of these employees was 41.74 years. Most of them were married and had children and a number owned their own homes in the vicinity of the mine. Following the closing of the mine, the company was permitted to retain 42 men for maintenance purposes.

Central Eureka's equipment included machine shops, electrical shops, blacksmith shop, carpenter shop, an assay office, a complete mill from primary crush to cyanidation, and its own source of timber. It had all the automotive and other necessary equipment required to carry on its mining operations and the servicing of the underground workings. On October 8, 1942, the company was operating profitably and could have continued to so operate throughout the entire period of the L–208 closure without acquiring any critical materials, machinery or equipment and with a reduced force of labor. The properties of the company were useful for no other purpose than the production of gold, and were adaptable to no other use than the conduct of a gold mining business.

Following the issuance of L–208, Central Eureka attempted to operate a copper mining project at Battle Mountain, Nevada, but abandoned the work in the summer of 1943. Central Eureka leased some mining equipment to individuals engaged in tungsten mining. It does not appear that any of the company's equipment or materials were ever requisitioned by the Government or acquired on mandatory orders by the Government's designees.

The closing of Central Eureka mine was brought about by compliance with the provisions of L–208 which ordered the mine to close and to cease using its materials, supplies, machinery and equipment to operate the mine. We conclude that L–208 amounted to a temporary taking of the profitable use of the mining properties of Central Eureka for which Central Eureka is entitled to be paid just compensation with-

in the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Oro Fino Consolidated Mines, Inc.

On October 8, 1942, certain gold mining properties located in Ophir Mining District, Placer County, California, were operated by J. C. KempvanEe under lease, dated September 5, 1935, from Hazel P. Gridley. Subsequent to receipt of L–208 from WPB, the lessee was permitted by WPB to continue the removal and milling of broken ore until January 15, 1943. Thereafter, operations at the mine were discontinued and the mine closed down.

As of October 8, 1942, there were approximately 11 employees in the mine as contrasted with about 40 in normal times. The mine was equipped with the necessary machinery and equipment on October 8, 1942, but how long the mine could have continued in operation without acquiring additional materials, supplies or equipment, is not established by the record. The mine could be used for no other purpose than the production of gold, and its closing in early 1943 was due to compliance with those provisions in L–208 which ordered the mine to be closed and prohibited the operator from using materials, equipment and facilities on hand to operate the mine.

Defendant raises a special defense in this case. Defendant urges that plaintiff, Oro Fino Consolidated Mines, Inc., is not the real party in interest and that the claim, if any, with respect to the closing of the mine, resides in J. C. KempvanEe because the assignment of the lease by KempvanEe to the corporation did not include this claim. Plaintiff argues that the language of the assignment is sufficiently broad to cover the claim of KempvanEe against the United States.

The assignment, dated February 2, 1950, states that the lessee, KempvanEe

> "does hereby sell, assign, transfer and grant unto ORO FINO CONSOLIDATED MINES, INC., a corporation, all right, title and interest in and to that certain mining agreement and the real property therein described and all rights arising by virtue of said agreement, dated

> September 5, 1935, by and between HAZEL P. GRIDLEY, a widow, designated as lessor and J. C. KEMPVANEE, designated as lessee, * * *."

At the time of the alleged taking, KempvanEe was the owner of the lease covering the mining properties and the damage, if any, was to KempvanEe. It appears that in 1948 the financial backer of KempvanEe died and he turned for financial assistance to another individual who suggested that the mining operation be incorporated. As a result, the plaintiff corporation was organized on January 4, 1950, and on February 2, 1950, KempvanEe assigned his rights in the lease to the corporation.

We think it immaterial whether or not the somewhat ambiguous assignment conveyed to plaintiff the original lessee's right to receive just compensation or not since, if it did, the anti-assignment statute, 31 U. S. C. 203, bars plaintiff's recovery. *United States* v. *Shannon*, 342 U. S. 288; *Potts* v. *United States*, 130 C. Cls. 88. In the *Shannon* case, the Shannons had purchased from the Boshamers a tract of land part of which had previously been leased by the Boshamers to the United States. Buildings on the land had been damaged by soldiers of the United States, and the contract of sale to the Shannons provided that the sellers, the Boshamers, released to the purchasers any claim, reparation, or other cause of action against the United States Government for any damage caused the property. The Boshamers were themselves unwilling to institute a claim against the United States. The Supreme Court held that the assignment of the claim fell clearly within the ban of the Anti-Assignment Act as a voluntary assignment, as distinguished from an assignment by operation of law. In the *Potts* case, *supra*, Potts held an oil and gas lease on land inundated by Lake Texoma with the building of Denison Dam. Drilling operations by Potts were damaged by the rising water in 1945. In 1950 Potts assigned the lease to Godfrey and O'Hearn. All three persons sued the United States for a taking. The Court of Claims denied the claims of Godfrey and O'Hearn, holding that whatever claim Potts may have had against the Government, he could not validly assign it to anyone.

If the assignment in evidence in this case did not convey to this plaintiff the claim of KempvanEe against the United

States, plaintiff is obviously not the real party in interest. If the assignment did convey the claim, recovery is barred by the anti-assignment statute. Accordingly, the petition of Oro Fino Consolidated Mines, Inc., is dismissed.

Alaska-Pacific Consolidated Mining Company

Alaska-Pacific Consolidated Mining Company is a State of Washington corporation owning and operating mining properties located in the Willow Creek (Wasilla) Mining District in the Territory of Alaska. The properties consisted of an underground or lode mine with about 5 miles of underground workings and with two entries. The mine is in an isolated area and except for timber, all supplies, including foodstuffs, were imported from the States by ship, rail and truck. Because of its isolation, the mine customarily carried a substantial inventory of parts, equipment and supplies and at the time the mine was closed by virtue of L–208, Alaska-Pacific had an inventory of parts, equipment and supplies sufficient to permit continued operations for at least one and one-half years. A company village was maintained at the mine, consisting of the mine and mill buildings, various warehouses, shops, dormitories, a school and an office building, a store, messhall and various recreational facilities.

The normal crew at the mine was about 125 men. On October 8, 1942, the mine had a crew of 101 men. The only other mines in Alaska at that time, aside from gold mines, were two coal mines. Only three of Alaska-Pacific's employees had any coal mining experience. There appears to have been an aversion, at least on the part of Alaskan gold miners, to working in coal mines, partly because of the hazards involved and partly because the equipment and machinery were different. Although the record does not establish the exact number of gold miners who transferred to the two coal mines, there were at least four and possibly a few more.

Alaska-Pacific was able to produce a small amount of concentrate essential to the smelting of copper and a certain amount of tungsten. WPB was inclined to permit the mine to continue operating for the production of tungsten and, in response to a series of appeals, the mine was permitted to continue operations until August 8, 1943, on which date WPB

required the mine to close down. Subsequent to the closure of the mine, Alaska-Pacific sold most of the perishable items in its inventory to such agencies as the Alaska Road Commission and the Alaska Railroad, and stored at the mine the other items.

The closing of the Alaska-Pacific mine was brought about by reason of compliance with the provisions of L–208 which ordered that the mine be closed and that the owners not use the materials, supplies, equipment and facilities on hand to operate the mine. We conclude that L–208 amounted to a temporary taking of the right of Alaska-Pacific to make profitable use of its mining properties, for which it is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

Bald Mountain Mining Company

Bald Mountain Mining Company is a South Dakota corporation owning certain gold-bearing lands in Lawrence County, South Dakota. On October 8, 1942, Bald Mountain was engaged in mining gold on those properties. Pursuant to appeals to WPB, Bald Mountain was permitted to continue gold mining operations until August 8, 1943.

On October 8, 1942, Bald Mountain employed approximately 150 men. How many of these men were hardrock miners or where they went after the mine closed in August 1943, the record does not disclose.

It appears that the mine closed in August 1943, because of L–208. The mine was reopened shortly after revocation of L–208 in the summer of 1945. The record does not disclose the nature or size of the mine's inventory of mining equipment, materials and supplies on hand when the mine finally closed, or how long the mine could have continued to operate without acquiring new materials, etc.

We conclude that L–208 amounted to a temporary taking of the right of Bald Mountain to make profitable use of its mining properties for which it is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

In that connection, however, consideration should be given to the probable length of time Bald Mountain could have operated its mine without acquiring additional materials, facilities or equipment for which priorities were required during the period L–208 was in effect and while the mine was closed.

Alabama-California Gold Mines Company

Alabama-California Gold Mines Company, a State of Washington corporation, owned certain gold-bearing lands located in the State of California. On August 8, 1942, Alabama-California closed its gold mine and ceased all operations because of its inability to secure sufficient manpower or materials. Inasmuch as the mine of Alabama-California was not closed by virtue of compliance with the provisions of L–208, there has been no taking of its right to make profitable use of its mining properties and the petition will therefore be dismissed.

Consolidated Chollar Gould & Savage Mining Company

Consolidated Chollar Gould & Savage Mining Company, a California corporation, owned certain gold-bearing lands in Story County, Nevada. Its method of operation on October 8, 1942, was an open-pit one. It had explored the location and size of the veins of gold and silver through an underground shaft, but finding the cost of mining through that shaft to be excessive, it had stripped off the rock above the veins containing precious metal, and was recovering ore by use of power shovels. Some time prior to the issuance of L–208 officials of the mine had determined that because of the shortage of rubber essential to the trucking of waste from the stripping operations, the development of new ore would no longer be practicable. The mine's management had also been making preparations to conduct operations which would consist of rehandling previously mined and processed ore, and machinery was installed for this purpose. On October 30, 1942, the company requested of WPB permission to conduct operations which would consist of the rehandling of previously mined and processed ore (tailings). It represented that such operations would require a crew

of only six men who would be available from the local community and were of such an advanced age that they were precluded from employment in copper mines or defense plants. It also stated that the planned operations would require no steel consumption and that the supplies on hand and available from mines already closed down would enable the operations to be carried to completion. WPB permitted such operations to be carried on first to February 26, 1943, and then to June 30, 1943.

The above-described rehandling operations proved to be financially impractical and on April 28, 1943, Consolidated Chollar requested permission of WPB to resume its normal open-pit operations. It stated that it expected equipment to be available as a result of the completion of defense projects in the area, and that it would require no more than 20 men from the locality whose average age was over 50 years. Consolidated stated that steel consumption would be low and that it had the necessary steel on hand to operate for at least six months. Consolidated had been granted a serial number for use in its permitted rehandling operations, but on June 19, 1943, WPB refused to transfer the application of that number to the resumption of open-pit operations. Consolidated then advised WPB that there were 15 men not suitable for work in war industries available in the locality and that there were sufficient operating supplies and fabricated repair parts on hand, with the exception of sodium cyanide, for the conduct of open-pit operations for six months. It stated that if such operations were authorized, priority assistance for supplies and equipment would not be required for six months except in the event of unexpected equipment breakdown.

On August 28, 1943, WPB issued Serial No. 36–26–T under Preference Rating Order P–56 which had the result of removing this plaintiff from the restrictions of L–208, and permitted the mine to conduct open-pit operations. It was also authorized by the serial number to the use of a priority rating for obtaining maintenance, repair and operating supplies. The rating was extended through the first and second quarters of 1944.

In December 1943, Consolidated Chollar advised WPB that during the previous ninety days' operations under its

serial number it had been unable to bring its operations up to capacity because of the inefficiency of available labor and the lack of adequate equipment in the form of power shovels and trucks but that it hoped this condition would improve in time. It stated that with 23 men it had been producing an average of 320 tons per day, compared with 400 tons per day in 1942, with approximately the same number of men.

The record does not disclose how long Consolidated Chollar continued open-pit operations under its serial number or its reasons for discontinuing its operations if, in fact, it did discontinue them.

The record discloses that after the war Consolidated found it necessary to first remove overburden from above the ore vein because no ore was clear for breaking. The reason for this was that during the effective period of L–208, Consolidated Chollar had been able to process all the ore which it had stripped of overburden prior to the close of 1942.

From the above, it appears that open-pit mining operations of Consolidated, in which it was engaged in October 1942, were not discontinued as a result of the issuance of L–208 except for the period from sometime in November 1942 to August 28, 1943, and during that period Consolidated was permitted to carry on the rehandling of previously mined and processed ore in accordance with plans it had made early in 1942. We conclude that while Consolidated's operations were curtailed by WPB, they were never required to close down as provided in L–208, nor were they ever made to comply with that part of the order which prohibited the use of materials, equipment and facilities owned by them for any purpose having to do with the operation of the mine. The right of Consolidated Chollar to make profitable use of its mining properties was regulated but it was not taken or destroyed for any period and this plaintiff is accordingly not entitled to recover. The petition of Consolidated Chollar Gould & Savage Mining Company will therefore be dismissed.

Ermont Mines, Inc.

Ermont Mines, Inc., an Oregon corporation, owned a compact block and contiguous quartz lode mining claim, desig-

nated by numbers 1 through 34 inclusive, and located in the County of Beaverhead, State of Montana.

At the time of the issuance of L–208 in October 1942, Ermont was working claims numbered 1 (with drifts on claims numbered 2, 3 and 4), 2 (working over into claim number 6), 7, 9, 19, 20, 23, 24, 28 and 32. After receiving the WPB order to close down pursuant to L–208, Ermont continued taking out ore already mined, ran it through the mill and refinery, and shipped it to the mint. Sometime in November, the mine and buildings were closed and a watchman was employed to look after the property.

An October 8, 1942, Ermont employed a crew of men adequate to work the above claims. The men had homes in the vicinity of the mine. The mine had sufficient supplies, machinery and equipment in good working order which would have enabled the mine to continue operations for at least a year from October 8, 1942, if the mine had not been closed down pursuant to L–208. Mining operations were resumed at Ermont at sometime subsequent to the revocation of L–208.

We conclude that L–208 amounted to a temporary taking (for at least one year) of the right of Ermont to make profitable use of its mining properties for which Ermont Mines, Inc., is entitled to be paid just compensation within the meaning of the Fifth Amendment to the Constitution. The case will be remanded to a commissioner of the court for trial on the question of damages.

In summary, the following plaintiffs have established their right to recover just compensation for a temporary taking of their right to make profitable use of their gold mining properties and their cases will be remanded to a commissioner of the court for trial on the question of damages: Homestake Mining Company; Idaho Maryland Mines Corporation; Central Eureka Mining Company; Alaska-Pacific Consolidated Mining Company; Bald Mountain Mining Company, and Ermont Mines, Inc. In view of our decision in these cases it is unnecessary to discuss the various contentions relative to the special jurisdictional act of July 14, 1952, 66 Stat. 605.

The petitions of Alabama-California Gold Mines Co., and Consolidated Chollar Gould & Savage Mining Company will

be dismissed, inasmuch as it does not appear that they were closed down as a result of compliance with the provisions of L–208, which circumstance also removes them from any possible coverage by the special jurisdictional act.

The petition of Oro Fino Consolidated Mines, Inc., will be dismissed for the reasons set forth hereinbefore. It is so ordered.

MADDEN, *Judge*, and WHITAKER, *Judge*, concur.

JONES, *Chief Judge*, dissenting:

I concede that that part of order L–208 which directed certain mines to be closed down was invalid. The statute did not authorize such action. Paragraph (b) (1) of that order undertook to do that and was therefore issued without authority. However, paragraphs (b) (2) and (3) of the same order, which forbade the use of critical materials in nonessential industry, were valid exercises of the President's power under the allocation statute and they would have produced the closing down of the mines whether or not paragraph (b) (1) had been included.[1] I would hold that paragraph (b) (1) of order L–208 should therefore be construed as mere surplusage and not an exercise of the President's powers of eminent domain. Since the valid portions of the order would have produced the closing of the mines, the added part of the order becomes immaterial.

During the war limitation orders were issued to curtail or prohibit the use of critical materials in the manufacture of nonessential products. L–208 (b) in its second and third paragraphs did just that. The majority concedes that such mines as did not have critical materials on hand are not entitled to recover for the reason that the gold mining process did consume critical materials and that regulations (other than L–208) depriving the operators of the effective right to acquire such materials were valid under the statute.

It follows that L–208, in so far as it prohibited the acquisition of critical materials, was valid. In so far as this order or other priority or allocation orders, either working together or separately, forbade the use of critical materials on hand for nonessential purposes, they were also valid wartime regulations. *St. Regis Paper Co.* v. *United States*, 110

[1] The full text of L–208 is set out in finding 43.

C. Cls. 271; cert. den., 335 U. S. 815. I do not think it matters whether the acquisition or use of critical materials was prohibited by L–208 or by it in conjunction with other priority or allocation orders.

The majority concludes that those operators who had critical materials on hand are entitled to recover for the time that these materials would have allowed them to continue operation. In this respect the court seems to rely mostly on its conclusion that in so far as L–208 prohibited the use of critical materials on hand, it was arbitrary. The court bases this conclusion in turn primarily on the fact that the Government took no affirmative steps to allocate the materials "away from" the gold mine operators into more essential uses.

We do not think this was necessary under the circumstances. If indeed these materials were critical, then it is natural to expect that, under the operation of supply and demand, such materials would find their way into essential uses. In fact it would have been wholly impracticable in a great national emergency for any agency of government to allocate and assign every bolt, nut, and piece of critical materials. Thus, for example, even those who were engaged in essential wartime industry were often merely given priority orders which were little more than hunting licenses and these industries had the task of locating and securing the critical materials. The fact that our nation, unprepared though it was, was able to produce wartime materials on a vast scale is a magnificent tribute to our free economy.

It was reasonable to suppose that the gold mine operators would attempt to reduce their capital investment in materials which they had no authority to use. This did in fact happen in the case of the Central Eureka Mining Company which leased some of its equipment to persons engaged in tungsten mining. Thus, while it may be true that there were other motives and purposes in issuing L–208 than the allocation of critical materials, I do not think that in so far as L–208 was intended to allocate critical materials it was arbitrary. There can be no question that some strategic materials could be expected to be saved by the dual prohibition of forbidding the gold mines to acquire new strategic

materials and preventing the use of the materials and equipment they had on hand.

It cannot be said that L–208 and concurrent orders in their prohibition of the use of strategic materials on hand had no reasonable relation to the execution of the lawful purpose of allocating strategic materials. *Jones* v. *City of Portland*, 245 U. S. 217, 224. That this may have been done more effectively by other means does not matter.

The President had neither the constitutional power nor the statutory authority to close the mines directly. It is probable that as a legal matter the enforcement of that part of the order which directed the closing of the mines could have been enjoined. However, in wartime that is not a very practical remedy because it puts any individual or company in the position of hindering the war effort. In any event the Supreme Court has ruled that the defendant cannot be held for damages flowing from an unauthorized act of its officials. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U. S. 380, 384. Besides, if that portion had been enjoined, the valid portions of the order, as well as concurrent orders freezing the uses of critical materials, would have remained in effect. These would have compelled the closing of the mines, and the injunction would have been useless.

There is no doubt that plaintiffs were damaged by the necessity of closing the mines. War produces many hardships. It entails many sacrifices. When ceilings are placed on the prices of the products of farm and factory, when wages are frozen and when young men are taken and sent to face hardships and even death on distant battlefields at a small rate of pay in the fixing of which they have had no part, when prices generally are fixed, when all the interests of the nation are fused in the common purpose—losses are inevitable. No nation could justify such action in normal times. It would be next to impossible to measure and pay all the losses involved in an all-out war.

If the Congress should see fit to acknowledge liability to these owners on the ground that their losses were unusual, the court should willingly undertake to determine the amount, but unless this is done I do not think the court should select these losses to be compensated.

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LARAMORE, *Judge*, dissenting:

The majority opinion points out that L–208 was not an allocation order, as it purported to be, but rather was clearly an order closing gold mines deemed nonessential to the war effort; *i. e.*, those mines whose gold production in dollar value exceeded 30 percent of their total production.

There was no authority vested in the President to directly close a business. The President could regulate the gold mines, allocate materials away from them, or requisition their materials, or even the business itself, if he determined their need essential for defense, and that such need was immediate and would not admit delay or resort to any other source of supply, and all other means of obtaining the use of such property for defense had been exhausted. See Act of October 16, 1941, 55 Stat. 742. Instead of determining that these gold mines were needed for defense, the President determined that they were nonessential and that the national defense would be better served by their closing.

The majority considers the closing under such circumstances to be a taking of plaintiffs' right to do business and compensable under the Fifth Amendment. I believe that the President lacked the constitutional power and statutory authority to close these mines and, therefore, the unauthorized closing could and should have been enjoined. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

Inasmuch as the President lacked authority to close these mines, and such closing has not been ratified by Congress, the unauthorized closing is not compensable under the Fifth Amendment. *Hooe* v. *United States*, 218 U. S. 322; *United States* v. *North American Transportation & Trading Company*, 253 U. S. 330; *United States* v. *Goltra*, 312 U. S. 203.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner William E. Day, makes the following findings of fact:

1. On January 7, 1941, the President of the United States established the Office of Production Management, hereinafter referred to as OPM, and delegated to it the powers and duties described in Executive Order 8629 (6 Fed. Reg. 191) and Executive Order 8942.[1] On August 28, 1941, the President by Executive Order 8875 established the Supply Priorities and Allocations Board, hereinafter referred to as SPAB, and directed it to determine general policies for OPM.

2. By Executive Orders issued January 16 and January 24, 1942,[2] the President established the War Production Board, hereinafter referred to as WPB, and vested in the Chairman of that Board, acting with the advice and assistance of the members of the Board, the functions and powers formerly vested in OPM and SPAB. The Chairman of WPB was authorized by the Executive Order of January 16, 1942, to exercise the powers, authority and discretion conferred upon him through such officials or agencies as he might determine.

3. The function of WPB and its predecessor agencies was to exercise general direction over the war procurement and production program, to regulate the production and supply of materials and equipment necessary for the national defense, and after the declaration of war for the prosecution thereof, and to determine when and in what manner priorities should be accorded to deliveries of such material and equipment. These agencies fulfilled this function by the issuance of various orders, the most common of which were designated as "P" orders (priorities), "M" orders (materials), and "L" orders (limitation).

The "P" orders were generally addressed to buyers of materials and authorized them to attach to their purchase orders a letter or symbol entitling them to preference in

[1] In Executive Order 8629, the President delegated his priorities power under section 2 (a) of the Act of June 28, 1940, 54 Stat. 676, and his power of requisitioning under section 9 of the Act of September 16, 1940, 54 Stat. 885, 892, including the power to take possession of plants. Further requisitioning power conferred on the President by the Act of October 10, 1940, 54 Stat. 1090, and the Act of October 16, 1941, 55 Stat. 742, were delegated to OPM by Executive Order 8942, Nov. 19, 1941.

[2] Executive Order 9024, January 16, 1942; Executive Order 9040, January 24, 1942. The latter order delegated to WPB the President's power under section 120 of the National Defense Act of 1916, 39 Stat. 213, to place mandatory orders and to take possession of plants.

delivery. Once having been granted, this preference could usually be applied on a repetitive basis.

The "M" orders were usually directed to the manufacturers or distributors of materials and were aimed at controlling either the use or the distribution of particular materials. These orders frequently prohibited producers from selling to any buyer unless the buyer had some preference rating.

The "L" orders were usually issued to prohibit or curtail the manufacture of end products containing critical materials, continued production of which would have necessarily consumed such critical materials. Sometimes an additional purpose of such "L" orders was to accomplish the conversion of scarce manufacturing facilities to war production.

"L" orders were issued prohibiting or limiting the production of end products such as office machinery, furniture, bicycles, stoves, refrigerators, laundry equipment, automobiles, and other products. In most instances a prohibition against the production of a product resulted in the facilities being transferred to war production. Thus, the automobile industry's facilities were largely converted to war purposes although some of the facilities may have become inoperative because of a lack of adaptability to other purposes or to war production.

Issuances of "L" orders sometimes released manpower employed in the production of the prohibited end products. Working with the particular industry branch involved in the "L" order, the Labor Production Branch [3] of WPB, assisted in making arrangements whereby the application of the "L" order to the industry would be most effective in terms of the utilization of the services of the manpower so released.

Where an area was threatened with serious economic dislocation by reason of the threatened closing down of a primary industry resulting from an "L" order because substitute

[3] On March 18, 1941, OPM issued Regulation 5 (6 F. R. 1598, 32 CFR 2875—1941 Supp.), establishing a new operating division known as the "Labor Division". The functions and duties of this division were (1) to ascertain labor requirements for national defense; (2) to develop programs and coordinate efforts for assuring an adequate and trained labor supply for defense purposes; (3) to advise regarding problems and standards of work and employment in defense industries; (4) to assist in the prevention and adjustment of labor controversies which might retard the defense program; (5) to advise and collaborate with other divisions of OPM on all matters affecting labor.

materials were not available to produce that industry's product, either the area or the industry could be certified as "distressed" by WPB. Such a certification entitled the firms in the area to special treatment in the awarding of war orders, i. e., the orders did not have to go to the lowest bidders, and financial assistance could be given to enable the plants to convert. The entire washing machine industry was so certified.

The preference ratings assigned under the "P" orders originally ranged from A–1 to A–10, with the highest rating, A–1, being further subdivided. There was no control over the number of buyers who might be given a particular rating, and a buyer having one of the lower preference ratings might and often did find it impossible to purchase any material because the holders of the higher ratings had exhausted the available supply.

4. In the decisions by OPM and WPB to issue a "P", "M", or "L" order, a number of considerations might be involved such as the conserving of essential materials, supplies and equipment for use in essential war industries, the increasing of production of strategic raw materials or essential end products, and the maximum utilization of available manpower. In the earlier months of the war some areas of the country were still suffering from large scale unemployment.

5. On July 29, 1941, OPM issued Preference Rating Order P–23 in order to facilitate the acquisition of materials by producers of machinery and equipment used in the mining, beneficiation and preparation of coal and metallic ores. Said order authorized such producers to use a preference rating of A–3 for the acquisition of such materials.

6. On September 9, 1941, OPM issued Preference Rating Order P–22, known as the General Repair Order. It authorized a broad variety of industries, including mines and quarries generally, to use an A–10 rating for the acquisition of material needed for the repair of their property or equipment.

7. On September 17, 1941, OPM issued Preference Rating Order P–56 and amended it on September 22, 1941. Said order, as amended, authorized recognized mining enterprises to use a preference rating of A–8 for the acquisition of materials needed for operating supplies and for the main-

tenance of the property and equipment of such mines. Under the terms of said order OPM was to issue so-called mine serial numbers to all mines certified by an appropriate agency of a State, Territory or possession as constituting a recognized mining enterprise.

Placer gold mines but not lode gold mines were expressly excluded from the benefits of Order P–56. Placer mining is the derivation of gold from streamborne materials in contrast with lode mining which is the underground working of auriferous quartz veins in hard rock.

The reason for the distinction between lode and placer mines in the assignment of preference ratings under Order P–56 was set forth in a report entitled "Status of Gold Mining" submitted to SPAB on November 18, 1941, by its Executive Director, Donald Nelson. The report read in part as follows:

> * * * Most lode mines are underground, and consequently subject to the hazards of rapid depreciation if they are shut down. Flooding by water is the chief hazard. Though not all lode-mining is deep enough to suffer seriously if a shutdown occurs, continuity of operation is clearly desirable to prevent depreciation of installed equipment and structures. On the other hand, placer operations can be discontinued (and often are, seasonally) without injury to equipment. * * *

Another reason for this distinction was stated in November 1941 by Dr. Wilbur Nelson, who was then Priorities Specialist and Administrator of Order P–56 and who later became the Chief of the Mining Branch of WPB, to be "that we felt that we must start restricting mining activities where they were not essential to the production of materials needed in a defense effort." This referred to the fact that placer mines produced only gold, while many lode mines produced other metals.

8. In the memorandum submitted to SPAB on November 18, 1941, Mr. Donald Nelson had reviewed the problems relating to furnishing materials both to gold mines in the United States and to gold mines in foreign countries, and had said, in part:

> 1. A general announcement of policy toward gold-mining is needed. Otherwise, specific *administrative* actions will be questioned by the mines as unfairly dis-

criminatory. This is particularly necessary if the purchase of new machinery for gold production is to be virtually prohibited after November 30. A necessary preliminary to such a declaration would be a request to the Treasury for an immediate formal opinion on the significance of new gold production to monetary policy. It is to be emphasized that from a consumption of scarce materials standpoint, this whole issue is a minor one. Only about $7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political. It is political from two opposing standpoints—that of popular reaction to the continuation of an industry widely regarded as unnecessary (to the point of jocularity), and contrariwise, that of the regional interests delineated in the report.

2. The continuation of the right of lode gold mines to use the A–8 rating under Order P–56 could be made entirely discretionary with the Director of Priorities. The guiding principle might be established by SPAB of requiring their purchases to be held to the bare minimum necessary to prevent disastrous shut-downs. SPAB might also wish to establish a separate test of eligibility in terms of the amount of other more useful metals that are produced jointly with gold. For example, if the selling value of the essential metals is 25 percent and that of gold produced 75 percent, the mine might be permitted to buy machinery and supplies on the same basis as other essential metal producers. Or the minimum ratio might be set at 40 percent in the value of other metals, and 60 percent gold. The intent would be to avoid any discouragement to production of the essential metals.

3. An alternative, and more drastic, policy would be to eliminate all domestic gold mines, whether lode or placer, from Order P–56 and also from the general repair Order, P–22. Gold mine operators would thus be forced to buy repairs and supplies without A-ratings, but could apply for special help on Form PD–1. It is quite possible that only very gradual declines in output and employment would result, because of managerial ingenuity. Here again, exceptions could be made for mines producing other metals.

4. In lieu of any blanket privileges to foreign mine operators, all foreign mine needs could be reviewed continuously with the Economic Defense Board, so that considerations of inter-American and British American policy could be consistently applied to decisions authorizing or forbidding shipments of gold-mining machinery

and repair parts. No serial numbers authorizing several purchases would be issued, but applications for individual shipments would be entertained. Here again, the specific quantities of burdened material (which are not large) are not the issue, but the political considerations involved and the question of treating nonessential industries consistently are paramount. In the special case of Canada, the Joint Economic Committees could secure all relevant statistical data.

5. Some special basis of treatment might be worked out for Alaska, where gold mining assumes the proportions of a majority industry. To cut off suddenly all shipments of new equipment needed for replacement, and to make it unduly difficult to secure supplies, might have several effects upon employment in Alaska, and upon the revenues of the Territory. The Labor Division might be asked for a formal opinion on the probable impact upon employment in the Territory of the restrictions suggested in this report. The Territorial Government could also be asked for a formal report on the importance of gold mining, with all relevant statistical data.

On November 24, 1941, a meeting concerned with priorities and export licenses for gold-mining machinery was called by A. A. Berle, Jr., Assistant Secretary of State. It was attended by representatives of the Treasury Department, the Federal Reserve Boa d and OPM, as well as the State Department. The consensus of opinion at such meeting was reported that:

> * * * preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output and to refusing equipment for any expansion of output; subject to exceptions in cases where extraordinary hardship might result—as in the case of isolated communities having no alternative forms of employment—preference ratings for exports of gold mining equipment should be made to depend on a showing that the maintenance of the present level of gold production is necessary (a) to supply dollars for an otherwise deficit dollar position in the balance of payments of the country (or in the case of South Africa, for the dollar position of the sterling area), or (b) for special political reasons; whenever the current gold mining is maintained mainly to prevent a dollar deficit and especially where the labor could be used for more direct contribution to defense production, this Government

should endeavor to find other means of meeting this deficit such as lend-lease activities, purchase of gold "in the ground" for postwar delivery, and the like. To give effect to the foregoing conclusions, no general priority ratings for gold mining equipment, including repair and replacement parts, should be granted but individual consideration should be given to each application on its merits unless adequate periodic compliance investigations can be made (particularly in Canada) as is done in the United States.

On December 2, 1941, SPAB, having before it the report of the November 24 meeting quoted above, directed Donald Nelson to obtain the official opinions of the State Department, Treasury Department, Federal Reserve Board and the Board of Economic Warfare on "supplying gold mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit positions."

9. Donald Nelson complied with the directions of SPAB, and secured the official comments of these departments and agencies. The Secretary of the Treasury stated in part as follows:

> * * * Domestic gold production in wartime serves no military purpose, but does consume labor and materials that have usefulness in military production, particularly in the mining of scarce metals. We do not believe, therefore, that domestic gold mines should receive any preference rating for machinery unless the gold is produced with a substantial amount of much needed by-product metals or ores, or unless it is produced in a mine so peculiarly situated that serious and sustained unemployment of men not eligible for defense jobs would result from its shutdown.

The Secretary of State confined his reply to the subject of supplying gold-mining equipment abroad, and said in part:

> It is the Department's opinion that preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output, and to refusing equipment for any expansion of output. * * *

The Chairman of the Board of Governors of the Federal Reserve System stated in part that:

> Priority measures tending to reduce new gold production under present circumstances are, in my judgment,

highly desirable. The United States stock of gold is already redundant. Its dollar value is more than five times as great as in the 1920's. From the standpoint of credit control in this country further additions to gold stock are not only unnecessary; they are harmful. By swelling excess bank reserves, they add to inflationary dangers and make the maintenance of a stable and productive economy more difficult. From the standpoint of war output of the allied countries, the materials, machinery, and labor devoted to gold production are largely wasted.

* * * * *

Since new gold output is largely unnecessary and diverts materials, machinery, and labor from production of war supplies, I strongly favor curtailing it so far as is practicable through the priorities system. I would suggest that no machinery be allowed to foreign mines for the expansion of gold output; and that machinery and supplies for the maintenance and repair of gold mines should be restricted to the minimum consonant with the principles adopted by the Supply Priorities and Allocation Board for other nondefense industries.

Milo Perkins, Executive Director of the Board of Economic Warfare, after discussing the question of supplying mining equipment to foreign gold mines, proceeded to outline a policy with an ultimate objective of eliminating the domestic gold-mining industry in the postwar era. In this connection he stated:

The system of priorities on gold mining equipment was devised as part of the general effort to economize on scarce facilities and thereby to maximize the joint war effort of the nations fighting for the democratic cause. But in dealing solely with the question of gold mining equipment there is a danger of losing an opportunity both to solve the longer-term aspects of the gold problem and to maximize the joint war effort. Such an opportunity exists now. The United States can and should use the power that it derives from being practically the sole buyer of the yellow metal in order to initiate a program of a gradual reduction in gold production. Such a program would contribute to a maximization of the joint war effort and, at the same time, would facilitate a solution of the postwar gold problem.

* * * * *

It is essential therefore, that a reduction in gold mining should be envisaged for the postwar period. It is, however, obviously impossible to effect a cessation of

gold production overnight because of the enormous dislocation it would involve in the national economies of the more important gold producing countries. The purchase of gold in the ground leaves the problem unsolved, and merely adds to the difficulties of the immediate postwar period. A program of gradual reduction and final cessation of all new gold production spread over a period of fifteen to twenty years is the only satisfactory solution to the general gold problem. This is the moment to institute such a program. Further, the United States possesses the necessary powers to initiate such a program. Being practically the only buyer of the yellow metal, the United States is in a position to demand that its future purchases will be on an increasingly restricted scale. * * *

On December 23, 1941, Donald Nelson sent his summary of the foregoing letters to SPAB in the following terms:

As directed by the Board at its December 2d meeting I have obtained the official opinions of the State Department, Treasury Department, Federal Reserve Board and Board of Economic Warfare on supplying gold-mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit positions.

The following is a summary of these opinions:

1. In a war economy labor, materials, and machinery applied to gold production are largely wasted. Moreover, dollars made available through Lend-Lease, R. F. C. and stabilization loans, etc., have made new gold unnecessary as a provider of dollar exchange. Therefore:

(a) Nothing should be allowed for expansion, although minimum amounts for maintenance and repair should to some extent be provided.

(b) Only high-grade ores or those yielding high percentages of other minerals useful in the war effort should be mined.

(c) Labor, materials and machinery should be converted to more vital production except where extreme political or economic hardship would result.

2. In-the-ground purchase of gold is neither necessary nor desirable. It is an experiment which raises serious complications and not only fails to solve the present problem but also presents a new one for the postwar period.

3. Agreements should be entered into with gold producing countries, to the end that they do not divert labor, materials and machinery from more essential uses to gold production.

On the same day SPAB adopted the spirit of these recommendations. It stated:

> It was the judgment of the Board that in view of the military program only limited priorities and export licenses should be granted to the gold mining industry,

and it was agreed

> that in granting priorities and export licenses for gold mining machinery, materials should not be allowed for expansion of production although minimum amounts for maintenance and repair may be provided,

10. On December 18, 1941, OPM issued a new General Repair Order, Preference Rating Order P–100, to replace Order P–22, which was revoked on the same day. The stated purpose of Order P–100 was to effectuate the policy of SPAB in maintaining governmental, charitable and industrial property located in the United States, its territories and possessions, upon an adequate operating basis, without expansion or improvement of facilities except where duly authorized or approved. Industries coming within the terms of Order P–100 were entitled to an A–10 Preference Rating (the lowest rating used) for their maintenance, repair and operating supplies.

P–100 represented a continuation of SPAB's policy of granting some preference rating for maintenance, repair and operating supplies to industries in general without regard to essentiality in the war program, and this policy prevailed throughout the war. This policy was designed to avoid unnecessary dislocations in the civilian economy. The percentages of critical materials such as steel, aluminum and copper used in all industries for maintenance, repair and operating supplies ranged from one-half of one percent to three percent of the total amounts available for the entire economy.

11. On December 31, 1941, OPM issued Preference Rating Order P–56–a to supersede P–23, which had expired on that date. Order P–56–a continued to authorize the manufacturers of mining machinery to use a preference rating of A–3 to acquire material entering into the production of machinery and equipment ordinarily used in the mining industry, including the gold-mining industry.

12. By a letter dated February 18, 1942, John P. Gregg, Assistant Chief of the Bureau of Priorities, WPB, proposed to C. H. Matthiessen, Jr., Chief of that Bureau, that gold and silver mines be closed forthwith in order to conserve materials. The letter stated in pertinent part:

> 4. The Committee is of the view that the restrictions with respect to materials to be used in the mining of gold and silver are not sufficiently restrictive and that a limitation order should be drafted forthwith to stop production of gold and silver in the United States, appropriate consideration being given to the continuance of such production in Canada, Mexico, South Africa, and other areas now permitted to obtain materials and equipment from this country under Lend-Lease or direct purchase.

13. Said proposal of February 18, 1942, to close the gold and silver mines as a means of conserving materials was rejected. Instead, on March 2, 1942, WPB amended Preference Rating Order P–56 so as to deprive gold and silver mines of all priority ratings formerly available to them under that order. This was accomplished by revoking the so-called mine serial numbers of all mines the production of which in dollar value consisted of more than 30 percent of gold and/or silver.

14. Although the amended Order P–56 required the revocation of the mine serial numbers held by gold mines coming within the foregoing 30 percent exclusion clause, in actual practice WPB restored such numbers to mines whose production included significant quantities of materials important to national defense. However, over 200 gold mines, including those of the plaintiffs herein, never again received serial numbers under Order P–56.

15. The amended Order P–56 was the subject of vigorous objections in the mining districts, and public meetings were held in Reno, Nevada, and Denver, Colorado, to protest the amendment. These meetings were attended by the Governors of five states, several United States Senators and Representatives, mine operators, Wilbur Nelson as Chief of the Mining Branch of WPB, and other interested parties.

16. In addition to the aforementioned meetings the 30 percent exclusion clause was the subject of extensive hearings before a special Senate Committee (U. S. Senate, 74 Cong.,

2d Sess., Subcommittee of the Special Committee on the Investigation of Silver, *Hearings*, May 5, 6, 8, and 28, 1942).

17. WPB on May 15, 1942, amended Order P–56 so as to eliminate the 30 percent exclusion clause. However, the amendment effected no practical change, since no person could use the ratings assigned by Order P–56 unless a serial number was granted by WPB. After March 2, 1942, serial numbers were never restored to gold and silver mines producing no substantial quantities of critical materials.

The gold mines excluded by the above amendments to Order P–56 were reduced to the same priority position as that of the least essential industries in the United States, i. e., they were entitled only to an A–10 preference rating for the acquisition of maintenance, repair and operating supplies under Order P–100. They were excluded from obtaining any critical materials which might have been needed by any of the nonferrous metal mines or by any other industry deemed by WPB to be more essential. While it was possible for gold mines excluded from any benefits under P–56 to apply for equipment under the general repair order P–100, the demand for desired equipment was so far above available supply that the possibility of the gold mines obtaining any was remote. Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment.

18. By July of 1942, the Labor Division of the War Production Board, and officials of the War Department and the War Manpower Commission, were all becoming concerned with the fact that the production of nonferrous metals in the United States, particularly copper, would not be adequate to meet current and anticipated demands. Investigation revealed that this condition was due not only to the increased wartime demands, but to an alarming shortage of miners in the nonferrous metal mines. The agencies concerned were agreed that the success of the country's armament program was basically dependent on increased production of basic raw materials such as copper and other nonferrous metals.

The reasons for the poor production of nonferrous metals were found to be (1) the out-migration of workers in the nonferrous mines to other war industries offering higher

wages and better working conditions, (2) drafting of the workers for the armed services by Selective Service, (3) excessive labor turnover within the industry, (4) low morale of the workers, (5) the short workweek in the mines, and (6) the lack of an organized and effective program of recruitment of workers for this industry.

Labor scouts employed by the aircraft and shipbuilding plants were working through the mountain states offering high wages and were inducing men to leave the mines. Armed services construction projects in the vicinity of the mines offered higher wages and were recruiting miners for work on such projects.

19. An informal committee organized by officials of the War Department to study the copper shortage situation submitted a report on July 8, 1942, recommending a program for dealing with the problem. For the War Manpower Commission it recommended a program for the recruitment of mine labor, involving among other things the expansion of the offices and personnel of the United States Employment Service in the mining areas, and including "a program for the orderly transfer of workers in gold mines and other nonessential industries to the nonferrous mines," as well as assistance in securing Selective Service deferments for mining occupations. For the WPB, the report recommended a Labor-Management Production Drive Committee to secure increased production through improved morale and greater efficiency; the report then recommended that:

> 2. Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort. * * *

For the War Labor Board the recommendation was that in the cases then pending before it, involving about half of the copper-mining industry, it give careful consideration to the wage differential problem. The recommendations for the Army and Navy were the establishment of morale building programs for the miners and the exertion of influence on their contractors to prevent further recruitment from the nonferrous mines.

20. The Labor Production Division[4] of WPB was also studying ways to relieve the shortage of underground workers in the nonferrous metal mining industry. On July 4, 1942, the Acting Chief of the Priorities Branch of the Labor Production Division sent a memorandum to the Director of Operations of the War Manpower Commission who was also in charge of the Labor Supply[5] functions of WMC at that time. The memorandum pointed out the acute labor shortage in the nonferrous metal mining industry and observed that the 15 largest producers of gold in seven Western States had some 6,700 employees; that the gold mines of these producers were sometimes located in the vicinity of nonferrous metal mines and that in some cases one company would own both a gold mine and a nonferrous metal mine in an area. The statistics upon which the above figures were based were as of 1941, and were later found not to represent the situation in the summer of 1942, because the gold mines, as well as the nonferrous metal mines, had been losing workers to the war industries and the draft. The 6,700 figure employed in the memorandum represented employees of all kinds, including clerical employees, and no figure was given of the number of hardrock miners which were the type of employee needed in the nonferrous metal mines. In speaking of the "15 largest producers of gold in seven Western States", the memorandum did not point out that several of such gold producers also produced nonferrous metals in substantial quantities and therefore would not be classified as gold mines for the purpose of any anticipated action.

The above memorandum described the large turnover in employment in the copper mines and the steady decline in over-all employment; it noted that most of the men leaving the copper mines were going into war plants or were being drafted into the armed services, and that the companies were requesting permission to hire Japanese and Mexican labor in their operations. The memorandum concluded as follows:

> Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and

[4] See footnote 3, supra, for the functions and duties of this division.

[5] When the War Manpower Commission was organized under Executive Order 9139, April 18, 1942, WPB's labor supply functions were transferred to WMC.

silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover.

21. On July 9, 1942, the General Counsel of the War Manpower Commission sent to a member of his staff a memorandum concerning the possibility of transferring gold miners to work in the nonferrous metal mines. The memorandum stated:

> At a meeting of the War Manpower Commission yesterday, the following problem was referred to this office.
>
> General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; (2) may the Chairman of the War Manpower Commission direct the War Production Board to take that action?
>
> The specific situation suggested is simply illustrative of the general problem in this field.

22. The proposal for closing the gold mines in order to divert their miners to nonferrous metal mines was gaining momentum in August 1942, and accordingly, Wilbur Nelson, Chief of the Mining Branch, WPB, who was not in sympathy with the method of the proposed plan, expressed opposition to it on August 14, 1942, in a memorandum to H. O. King, Chief of the Copper Branch, WPB, reading in pertinent part as follows:

> The Mining Branch views with serious alarm the dissipating of the only appreciable reserve of highly competent mining labor through the hasty closing of the gold mines in the United States.
>
> The gold and silver miners constitute the last reservoir of the skilled mining labor. We must, therefore, be

certain that that labor is directed toward the most critical points before permitting it to be disbursed. [Sic.]

The present critical situation developed when copper, lead, zinc, mercury and other miners left their jobs and went to the West Coast on shipbuilding and on aircraft jobs, and into the mountain areas in new war industries work.

If we close down the gold mines while these same opportunities are available for work at substantially high rates of pay in other war industries, the miners will not move to a copper, lead, or zinc mine but will do just as their predecessors have done, move on to other more fruitful jobs on the coast.

Logic dictates this, for when a copper miner at Butte is willing to leave his home and go to the coast, I am sure that a gold miner, living in the excellent living conditions at Lead, is not going to leave his family and stop at Butte if he could go to the west coast.

* * * * *

23. Late in August 1942, Guy N. Bjorge, General Manager of plaintiff Homestake Mining Company, the largest gold-mining company in the United States, learned that consideration was being given by the Government to a proposal to close domestic gold mines in order to divert their miners to the nonferrous metal mines. He therefore went to Washington and conferred with several officials of WPB, including Donald Nelson, Chairman, and Wilbur Nelson, Chief of the Mining Branch, as well as Brigadier General McSherry, Director of Operations of the War Manpower Commission, and Lieutenant General Somervell, commanding the Services of Supply, War Department. In the course of these conferences Mr. Bjorge furnished figures as to the small number of men who might be obtained for work in the copper mines by such order. He pointed out that many men had already left the Homestake Mine in 1942 for the same reasons that men had left the copper mines, mainly to accept employment at West Coast aircraft factories and shipyards. Mr. Bjorge also pointed out that the miners remaining at Homestake were an older, more stable class of men, a large percentage of whom were home owners, and asserted his belief that it was improbable that they would leave their homes for the poor housing facilities and undesirable working conditions at the nonferrous metal mines.

24. On August 26, 1942, United States Senator Pat McCarran of Nevada wrote a letter to Donald Nelson, Chairman of WPB, setting forth various reasons why he believed the proposed closing of the gold mines would not accomplish its purpose of obtaining any considerable number of miners for the nonferrous metal mines. Senator McCarran wrote, *inter alia:*

* * * * *

> In the first place, the transfer of necessary labor from closed gold and silver mines to mines producing copper, lead, zinc, etc., would be negligible, due to the fact that very few operations exist today where only gold and silver are mined, and in these districts (mainly, the Homestake Mining activity in South Dakota and the Mother Lode Mining district in California), the number of men who could be so transferred is small. Many of the usual workers have joined the armed forces; many are familiar only with the routines of this type of mining and cannot be successfully transplanted. Thus little good would result and great hardships would be inflicted upon affected families and communities.
>
> Secondly, there is no rule or procedure by which such workers could be legally forced to transfer to other mines. The labor that would be denied employment by reason of the shutting down of the mines producing gold and silver would most likely go to the places where they would receive higher wages than are paid in mines.

* * * * *

On September 1, 1942, Donald Nelson replied to Senator McCarran in pertinent part as follows:

* * * * *

> A serious study has been and is being made of sources from which mine labor could be made available to the nonferrous metal mines. Naturally, our thoughts have included gold mines, but we have not at this time reached any conclusion thereon.
>
> We quite agree that no legal power exists today by which workers may be forced to transfer to other mines. This accentuates the mine labor problem which faces us today.
>
> Because of your experience in mining matters, and the factual evidence you secured in your recent hearings in the West, I am asking our people responsible for mine production to carefully consider your suggestions.

* * * * *

25. The minutes of the War Production Board for the meeting held September 1, 1942, provide in part as follows:

1. Labor Supply for Copper, Lead, and Zinc Industries

The Chairman stated that since the labor supply in the copper industry had reached a critical stage and already had resulted in a decline in the production of copper, he had asked the Labor Production Division and the Copper Branch to report to the Board on the manpower problem in the nonferrous metals industries (Doc. 135).

Mr. King reported that 6,000 miners have been lost by the copper, lead, and zinc mines to other industries during the past several months and that the shortage of labor will become increasingly acute next year when new facilities will require 2,000 additional miners. Preliminary reports indicate a shortage of 2,100 workers in smelters and refineries. Mr. King pointed out that the loss of 5 or 6 thousand workers at the copper mines might so influence the subsequent fabricating processes that 100 thousand workers in war plants at the end product state would be affected. Although monthly production of copper increased steadily from early 1941 to a peak of 95,000 tons in May and June 1942, output in July dropped 5,000 tons to 90,000. The copper outlook is even more critical than shown by the drop in production, since at many mines labor is being transferred from developmental and stripping operations, necessary to provide for future production, to current ore extraction. The position of the smelters and refineries is exemplified by a smelter at Tacoma where output of 2,000 tons of copper per month is being lost for lack of only 300 unskilled common laborers. Mr. King emphasized that production at the mines, smelters and refineries will continue to fall unless the exodus of labor is checked and the supply of workers augmented. Output of lead and zinc likewise declined in July, and the labor-production situation in these metals is similar to that in the copper industry.

Mr. Lund pointed out that there is general agreement that the higher wages paid to workers in competing occupations in other industries are the prime factor causing the out-migration of labor from the mines and mills. Average weekly earnings in April of 37.28 dollars for mine workers and 35.18 dollars for smelting and refining workers compared with an average of 53.30 dollars in shipbuilding and 45.94 dollars in aircraft, the principal competing industries. Corollary factors in the out-migration of workers have been rumors of ceil-

ings on wages and proposals to confine workers to their present jobs, the hazards of mining, and inadequate housing and transportation facilities.

Mr. Lund pointed out that the decision of the War Labor Board, expected within a month on 30 or 40 cases involving higher wages for copper miners, will have an extremely important bearing on the out-migration problem.

Mr. King reported that following a resolution of the War Production Board (See WPB Minutes, March 3, 1942, Item 7), labor-management committees were established in the metal mining areas and the importance of having mine workers stay at their jobs was publicized. On June 13, 1942 the Chairman of the War Production Board formally launched the War Production Drive in the nonferrous metals industries by a radio address to the miners at Butte, Montana.

As further steps in halting out-migration, the Inter-Departmental Committee on Nonferrous Metals was established on August 11 and various letters and literature have been prepared for distribution to mine operators and labor unions; an order has been prepared to prohibit the use of materials in nonessential gold mines, which may free about 8,000 workers; plans to prevent employment of miners on Army and Navy construction projects are being considered; and training programs are being introduced into mining properties. To increase the efficiency of present working forces, mine equipment is being accorded high priority ratings, and labor is being trained and upgraded by improving working and living conditions, and by lowering age and other restrictions on hiring. Mr. Lund observed that in many cases labor standards have shown no change from those existing in normal times when a surplus of labor is available. He suggested that the pooled employment interviews which the War Manpower Commission is now conducting in some parts of the country should be pursued with increasing vigor.

Mr. Lubin inquired if the order to prohibit the use of materials in nonessential gold mines had actually been issued and, if not, what steps are being taken toward its issuance. Mr. King, replied that a first problem is to define a nonessential gold mine since gold is frequently found in association with other metals and it is necessary to avoid denying materials to mines that produce important quantities of critical metals jointly with gold. It is hoped that an appropriate definition can be developed very shortly and an order issued promptly thereafter.

* * * * *

The Chairman remarked that since other uses have been cut to a minimum, the major use of copper is in munitions, especially small arms ammunition, and any reduction in the copper supply will be reflected in a reduced output of ammunition. He expressed the belief that the War Production Board must take an active and leading role in assuring an adequate supply of copper and Mr. Lubin added the suggestion that the concern of the War Production Board in this problem is sufficiently great to establish its own employment offices, if this is necessary to obtain additional copper miners.

After further discussion it was agreed that:

> Inadequate production of copper, lead, and zinc will result inevitably in reduced output of munitions, including small arms ammunition needed by the fighting forces. The output of these metals is now being reduced by a shortage of manpower in mines, smelters and refineries.
>
> The War Production Board is charged with the primary responsibility for providing the maximum possible production of critical metals, but the solution of the problem of assuring a sufficient supply of labor involves the responsibilities of other agencies of the Government as well. The coordination of the efforts and activities of other agencies of the Government with those of the War Production Board is needed, therefore, to ensure an adequate supply of critical metals.
>
> The War Production Board urges all agencies involved to promote and support such actions as may be necessary to provide to nonferrous mines, smelters, and refineries a supply of labor adequate for the maximum possible output of such metals. It is especially important that the facilities of the United States Employment Service be expanded and strengthened to meet this particular need.

* * * * * *

The Chairman referred to above was Mr. Donald Nelson, Chairman of the War Production Board. The Mr. King referred to was Mr. H. O. King, Chief of the Copper Branch, Industry Operations, WPB. The Mr. Lund referred to was Mr. Wendell Lund, Director of the Labor Production Division, WPB. The Mr. Lubin referred to was Mr. Isadore Lubin, acting for Mr. Harry L. Hopkins, Special Assistant to the President.

26. On September 4, 1942, Mr. A. I. Henderson, Deputy Director General for Industry Operations, WPB, directed that an order be drafted by the Miscellaneous Minerals Branch which would curtail the output of gold and which would not be related to Preference Rating Order P–56.

27. On September 9, 1942, Mr. R. J. Lund, Chief of the Miscellaneous Minerals Branch, sent the following memorandum to Mr. A. I. Henderson:

> At a meeting held in your office on September 4, attended by Messrs. Dodge and Scribner of your staff, Mr. Parks of the Miscellaneous Minerals Branch, and Mr. Stow of the Mining Branch, you issued instructions that an order be drawn up either by the Miscellaneous Minerals Branch or the Mining Branch which would curtail the output of gold and which would not be connected with Order P–56. You indicated that this Branch should prepare the order but that the order could be administered by this Branch or the Mining Branch as later determined.
>
> It was understood that the purpose of the order was to make mining labor now producing gold available to copper and other strategic nonferrous metal mines. This end can be attained by WPB only through its authority to control materials.
>
> Attached is copy of the order [6] for your consideration. This order has not been circulated, except in discussions with the Mining Branch.
>
> The order is designed to close all mines producing gold to the extent of 50 percent or more of the value of the total output. In considering the order the following matters are pertinent:
>
> (1) *Number of mines affected*
>
> Based on 1940 production figures obtained from the Bureau of Mines, the latest they were able to supply, about 220 lode mines will be affected by the order. This figure is not exact, because production in the 1941 or 1942 base period specified in the order is not strictly comparable with the 1940 picture. Geographic distribution of these lode gold mines is as follows: California, 58; Colorado, 32; Montana, 30; Nevada, 27; Arizona, 18; Alaska, 12; Idaho, 12; Utah, 8; South Dakota, 6; with the remainder distributed among five other states.
>
> Detailed data on placer operations affected by the order are not presently available, but the Bureau

[6] The copy of the order is not in evidence.

of Mines reported that in 1940 a total of 3,107 placer mines produced gold and silver in the United States, and 1,069 in Alaska. Undoubtedly, sizable numbers of these produced such small quantities that they would be exempted by the order.

The Bureau of Mines reported that in 1940 there were 49 connected-bucket floating gold dredges operating in Alaska, 46 in California, 12 in Idaho, 7 in Montana, 6 in Oregon, 1 in Colorado, and 1 in Nevada. In addition there were large numbers of mechanized placer operations using drag line and power-shovel excavators, but no separate figures on these operations are available.

(2) *Labor involved*

Based on 1941 data, latest available from the Bureau of Mines, approximately 12,400 employees in lode gold mines will be thrown out of work by the order. Incomplete data indicate that about 70 percent of this labor is employed underground. Geographic distribution of this total labor was as follows: California, 3,394; South Dakota, 2,123; Colorado, 1,689; Alaska, 1,251; Arizona, 911; Montana, 602; Nevada, 601; Idaho, 590; Utah, 484; with the remainder distributed in a number of Western and Eastern states.

No detailed data are available showing number of employees in placer operations, except that the number would probably amount to at least several thousand in the United States and perhaps two thousand in Alaska.

(3) *Estimated recapture of employees affected*

Assurances were given by General McSherry at a meeting of the Interdepartmental Committee on Non-Ferrous Metals, September 8, that the U. S. Employment Service had adequate staff available to go immediately into the several hundred mining camps which might be affected by the gold curtailment order and to recruit labor for transfer to copper mines and other nonferrous metal mines in dire need of such labor. At a previous meeting of this Committee, an estimate was made that about 25 percent of the mine labor might be recaptured for work in other mines.

(4) *Other metals lost*

Production of other metals in 1940 by mines affected is as follows: copper, 2,751,000 pounds; zinc, 92,000 pounds; lead, 12,047,000 pounds; silver, 4,947,000 ounces. Other metals such as antimony,

arsenic, tungsten, molybdenum and manganese are also produced in minor amounts by some of these mines.

(5) *Fluxing ore problem*

Some gold mines affected by the order produce large tonnages of siliceous ore required by smelters working primarily on other nonferrous metals, such as copper, lead and zinc. This flux is necessary to their operation, and gold values in the flux naturally make operations more economical than by adding barren siliceous material which may, or may not, be available at the smelter.

(6) *Critical materials saved*

Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available but the general order of magnitude of such consumption is indicated by the fact that in 1939 gold mines in the United States (excluding Alaska) spent about $17,000,000 on supplies and materials, $2,000,000 for fuel and about $5,000,000 for purchased electric energy.

(7) *Effect on economy of states and communities*

Shutting down the operations at mines affected by the order will result in loss of sizable tax revenues, in respect to state tax revenues alone, in some of the states involved. There has been insufficient time to obtain complete data on this point, but two examples are cited as follows: (a) In South Dakota, total state taxes collected in fiscal year 1941, exclusive of motor fuel taxes, amounted to $11,700,000; taxes paid to the state by mines in South Dakota affected by this order amounted to $1,000,000, or about 9 percent of the total; (b) in Nevada total taxes collected in fiscal year 1941, excluding motor fuel taxes, amounted to $3,300,000, of which about $65,000, or 2 percent, was collected from mines affected by this order.

Losses in county and municipal taxes will be felt much more severely by the communities in the vicinity of the mines. In this respect, shutting down mining operations is not comparable with shutting down other industrial operations in communities where enterprise is diversified; in the West it is generally true that the mine is the sole major source of income for local communities. For example, it has been reported that the Homestake Mining Company pays 65 percent of the local community taxes

and 50 percent of the county taxes; that the wage earners and those servicing them pay the balance largely from the $4,500,000 in annual wages paid by the company. At least 19,000 people, the population of the county, are directly or indirectly dependent upon its operation.

For reasons stated in the last paragraph, hardships faced by old established mine employees will be severe. . There is virtually no possibility of converting the facilities at the mines to war work.

(8) *Probable loss of deep mining operations and dredging equipment.*

Although the order permits gold mining companies to maintain buildings, machinery and equipment in repair, and to keep access and development workings in a safe and accessible condition, it is probable that most of the deep mines situated in heavy, caving ground will be unable to take full advantage of these provisions in the order. As a result it is probable that many of these old, deep mines may never be reopened.

Costly dredging equipment forced to lie idle will be subject to more rapid depreciation than if it were maintained in operation.

The suggestion was made at a meeting this morning that the order should be tightened further by lowering the exemption from the 4,000-ton figure to 1,500 tons annually, or a monthly rate of 100 tons. Such a change would result in a large increase in the number of mines affected by the order, in the total labor involved, and in items 3 to 6, inclusive, discussed above. Tabulations covering these smaller operations are just now being made, so details in respect to these items cannot be presented herewith. The order will be modified to the lower exemption figure before clearance, if these studies indicate a considerable amount of labor involved.

A factor which would tend to lower the number of mines affected, labor involved and other items discussed above, is the fact that many of the gold mines affected by the order have already been forced to curtail or close operations through difficulties encountered in obtaining material and equipment, or through loss of labor to other industries. In one known instance, a recent fire destroyed the mill of a sizable mine so this operation is completely shut down and no labor available for recruitment.

There is, of course, an appeal provision in the order, through which, again, the number of mines, number of employees, other critical materials and fluxing ores af-

fected will be lowered from the estimates cited in items 1 to 5 above.

Concluding Statement

Administration of an order such as the above, entirely divorced from provisions of Order P–56, necessarily involves duplication of work, both here in Washington and in the companies affected by the order. Those gold mines producing needed metals and fluxing ores will have to submit an appeal under the provisions of the order before they can be exempt. There is no practicable way of defining, in an order, such mines that should be exempted. This appeal procedure duplicates, in large measure, the appeals that were already made under the administration of P–56, and it is likely that the repercussions throughout the mining industry of such duplication of effort will be unwholesome.

Without using the mine serial numbers already established as a means for determining essential mining operations, there appears to be no alternative other than to use a percentage value basis in defining gold mines, and to provide for continued operation of essential ones through an appeal procedure.

Other pertinent considerations are presented in the attached memorandum to you from Dr. Wilbur Nelson, and I suggest that they be given careful attention.

The adverse repercussions mentioned above might be overcome in some measure by including an additional provision in the accompanying order which would automatically exempt those gold mines now having serial numbers until they are notified by the Director General for Operations that they are to cease operation. Each of these cases, in the meantime, should be carefully reviewed and judged in the light of the more acute situation now prevailing.

I shall await your written instructions before proceeding further.

28. On September 11, 1942, Mr. J. M. Scribner, an assistant to Mr. A. I. Henderson, sent the following memorandum to Donald Nelson:

In accordance with instructions issued by Mr. A. I. Henderson, you will find attached a copy of the proposed curtailment order on gold. This order is in process of circulation in accordance with the procedure for order clearance and should be presented to the Clearance Committee for action about September 21.

Mr. Henderson requested that the order be prepared in a manner completely divorced from Order P–56.

However, in his absence, after a consultation with Mr. H. W. Dodge and Dr. Wilbur A. Nelson, and a meeting with Messrs. Fred M. Eaton, Richard Lester, and myself, it was determined to be most practical that the order not be divorced from P–56.

The effect of this order will be to close down all gold mines not having a mine serial number, within 30 days from issuance. It is the intention of the Mining Branch to review all mine serial numbers assigned to mines producing 50% or more gold in dollar value and to withdraw such serial numbers unless the balance of the production represents critical materials urgently needed for the war effort in amounts sufficient to justify continuance of the operation.

In addition to the draft of the proposed order, there was also included an explanation of its effect in the following terms:

The Order requires that all mines producing gold, except those having a serial number under P–56, cease operation and development within 30 days after the date of issuance of the Order. The Order makes provision for the minimum maintenance and repair necessary to maintain the mines plant in condition and for the granting of preference ratings to accomplish this after application made to the Director General for Operations.

All gold mines which produce needed quantities of copper, lead, zinc, and other minerals, or of silicious fluxes, already hold serial numbers under Order P–56. Therefore, the mines closed down by this proposed order would be only those which have, after examination by the Mining Branch, already been determined to be nonessential to the war effort.

The result of closing these nonessential mines will be to conserve all the material which they have been using for operational and development purposes. Heretofore they have merely been denied the right to use the high preference ratings granted by Order P–56, but have been able not only to obtain certain material under P–100, but also to use their own inventories.

29. The effect of the proposed limitation order was further summarized in the following terms at about the same time:

A draft of a limitation order on materials and supplies for gold mining is being circulated within the War Production Board. The order provides for complete shutdown of nonessential mines in the United States with the following exceptions:

(1) Mines producing less than 1,200 tons of ore per year will be permitted to continue operations at

their rate of operation in 1941 or early 1942. Such mines are usually individual or partnership enterprises worked by men who are not likely to be employed by others.

(2) A limited amount of supplies and equipment will be made available for the purpose of keeping the mines accessible and safe. This is intended to avoid flooding or otherwise damaging mines which would be in a position to produce after the emergency has passed.

A nonessential mine is defined as a mining enterprise in which gold is produced, unless the operator holds a serial number for such enterprise issued under Preference Rating Order P–56, as Amended. Since producers of siliceous fluxing ores and of complex ores containing substantial amounts of critical metals as well as gold have already been granted serial numbers, the order will not affect the production of essential metals.

The basic purpose of this curtailment of gold mining is, of course, to free manpower for the mining of essential minerals, particularly nonferrous metals such as copper, zinc and lead. Because many of the gold mines are located much closer to other mines producing such strategic metals as mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc., it is expected that workers will also be made available to these industries.

The War Manpower Commission through the Employment Service is now taking steps to insure orderly recruiting of these gold miners and to provide for a minimum of delay in reemployment as well as to provide transportation expenses. It is expected that this procedure will make possible the maximum diversion of labor to essential mining industries where their skills can be used to best advantage.

Beside diverting manpower to essential industries, this order, when in effect, will also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc.

30. The minutes of the Interdepartmental Committee on Non-Ferrous Metals for September 15, 1942, provide in part as follows:

* * * * *

Dr. M. Stow presented a report on the proposed order to curtail gold mining operations. He distributed a copy of the proposed order which, he said, had been brought up for consideration before the Clearance Committee.

Dr. Stow explained that the persons responsible for drafting the order favored the method of curtailing gold mines by denying them serial numbers under P–56, rather than the type of blanket order which would shut down any gold mine whose gold ore production was above a stipulated proportion of its total production by dollar value. Under the former type of order the gold mines would be closed by being denied serial numbers under P–56, as a result of which they would be unable to obtain either supplies or equipment and would be prohibited from using their present supplies and equipment.

Mr. Harbison [Army representative] expressed some concern over the delay in issuing the gold order. He outlined the steps that various agencies had taken to meet the manpower shortage in nonferrous metal mines, and pointed out that the transfer of gold miners to essential mining was being held up by the lack of a gold curtailment order. He pointed out that the U. S. Employment Service had been unable to obtained any recruits at Rapid City, South Dakota, because the gold mines had not been closed down, although Anaconda Copper Mining Company had agreed to pay transportation costs. He made it clear that the War Department was impatient at the delay.

Mr. Lester of the War Manpower Commission asked that his organization be kept informed of what mines would be affected by the directive, in order that representatives of the Employment Service might be on the spot beforehand.

In this connection, since the primary purpose of the order was to free manpower rather than to curtail materials, Mr. Lipkowitz suggested that an advisory committee be established with representatives from Labor Production Division and War Manpower Commission.

The meeting was attended by representatives of the various minerals branches, the Mining Branch, the Labor Production Division, and the Legal Division of the War Production Board, as well as representatives of the War Manpower Commission, the Office of Price Administration, and the War Department. Dr. Wilbur Nelson presided at the meeting. Dr. Stow was immediately subordinate to Dr. Wilbur Nelson in the Mining Branch.

31. The draft of the proposed limitation order for the goldmining industry was submitted to Morris Creditor, Special Assistant to Donald Nelson. On September 15, 1942, he sent the following comments upon it to Donald Nelson:

I have reviewed the proposed limitation order for the gold mining industry and I wish to raise certain points as to the soundness of such an order.

You will recall that we received a letter from Senator Gurney on August 31 in which he set forth the harmful effects that such an order would have on the economy of the State of South Dakota. In your reply you stated in effect that we were confronted with the manpower problem and something had to be done to overcome the losses of production which are being experienced in the mining of copper and other strategic materials through the shortage of experienced miners.

In the preamble of the limitation order no mention is made of manpower requirements. It simply states that the order is made necessary because of the shortage in the supply of critical materials which are used in the maintenance and operations of gold mines.

It would seem to me that if the order is based on the premise of critical materials alone, the question might be raised as to why such an order would not apply to materials being sent by this country to other gold mines in Canada, South America, and South Africa.

If the main purpose of this order is to divert miners from the gold mining industry to copper and other mining industries, it seems to me that there is no assurance that this order would accomplish the desired results. As Gustav Peck pointed out to you in his memorandum of September 9, it would be too bad to close the Homestake Mine, for instance, without the assurance that most of the miners will continue to practice their trades in the copper mines.

Would it not be more practical to accomplish the purposes by a freeze order similar to that which is now in effect for workers in the copper mines and the lumber industry. This may be more drastic but, on the other hand, may give better assurance that the miners in the gold mines would eventually find their way into the copper mines. Consideration might also be given to the idea of having the Army give indefinite furloughs to Service men who in the past were engaged in the mining of nonferrous materials.

Even aside from the possible dissipation of these skilled miners into other occupations, there is a question whether the closing of all the gold mines will release any relatively large number of workers. As I understand it, in the case of Homestake Mine the proposed order would affect only about 450 miners. This is the largest gold mine and has from a third to a half of all the miners to be released. The Alaska-Juneau miners, incidentally,

will be stuck in Alaska. Where are they expected to go?

I am sure that a great deal of thought has been given to the proposed limitation order on gold mining, but unless there is a high degree of assurance that the main purpose will be accomplished; namely, the diversion of these miners to the nonferrous mines, I feel it is important to weigh the adverse effects it might have in other directions.

Actually, only a small amount of critical materials is used in gold mining. Hence, if it is contemplated to issue the order in its present form, the preamble should give the real reason; which is to divert this labor to more necessary industries.

32. On September 17, 1942, Mr. J. M. Scribner, assistant to Mr. A. I. Henderson, sent the following memorandum to Dr. Stow of the Mining Branch:

Acting in accordance with instructions received from Mr. Donald Nelson's office this morning, please be advised that the gold order is to be cleared with all of the branches involved as promptly as possible, but it is not to be presented to the Clearance Committee for clearance until further word is received from Mr. Nelson's office.

The order is to be held in the branch in such shape that it may be presented to the Clearance Committee for action immediately upon advice from Mr. Nelson's office that it is to go through.

33. On September 25, 1942, representatives of the branches of WPB concerned with mineral production met and discussed the proposed gold limitation order which, by that time, had been designated L–208. A resolution was passed urging that representatives of the gold-mining companies be called to Washington to discuss the proposed gold order so that:

A. Where possible, existing organizations may be utilized for important mining operations, or prospective operations, necessary in the war effort.

B. Labor, and especially experienced miners, can be made available to the mining industry, rather than lost to vital metal production.

34. On September 25, 1942, William L. Batt, Vice Chairman of WPB, sent a memorandum to A. I. Henderson, Deputy Director General for Industry Operations, WPB, which stated, *inter alia:*

I have told the Chairman that my judgment is that the limitation order on gold mining should be released at the appropriate time, and he has agreed. It was the consensus of opinion that we should wait until the War Labor Board had acted on certain wage matters, and I shall expect to be advised when the situation is clear on this point.

It seems to me imperative that we very carefully word our press release so that the predominant objective, namely of releasing less essential labor for more essential requirements, shall be clearly evident. And I particularly direct the attention of those who have to do with this matter at this point.

* * * * *

35. On September 30, 1942, a conference was held in Mr. Batt's office. Senator McCarran of Nevada and Senator Gurney of South Dakota, as well as Congressman Englebright of California, and Congressman Case of South Dakota, attended. Samuel Hill of the War Manpower Commission and members of the WPB staff, including Wilbur Nelson and Samuel Lipkowitz, also attended. The Members of Congress spoke of the hardships that would be imposed on the inhabitants of the gold-mining communities and of the detrimental effects on the morale of such people if the mines should be closed down by the issuance of a WPB order. The WPB representatives, except Wilbur Nelson, countered with statements emphasizing the need for labor in copper mines. Some discussion arose as to the number of gold mine employees who would be released by such a closing order.

36. On September 29, 1942, at the direction of W. L. Batt, Wilbur A. Nelson telephoned the following representatives of the gold mining industry and requested them to attend a meeting in Washington: Guy N. Bjorge, General Manager of Homestake Mining Company, Errol MacBoyle of Idaho Maryland Mines Corporation, Merrill Shoup of Golden Cycle Corporation, Carroll Searles of Newmont Mining Corporation, and Thomas McCormack of the Natomas Company. The meeting took place on October 1st and lasted for approximately five hours.

Those in attendance at the meeting included W. L. Batt, Wilbur A. Nelson, Allen Buchanan and Samuel Lipkowitz of WPB's Labor Division, Messrs. Hill, Harbison, Ayer, Hayes,

Heikes and Hatch, General Lucius Clay representing the War Department Services of Supply, General Frank J. McSherry of the War Manpower Commission, Senator Chan Gurney and Representative Francis Case of South Dakota, Representative Harry Englebright of California, and the five aforementioned representatives of the gold mining industry.

At the opening of the meeting Mr. Batt stated that he had brought the gold mine operators to Washington to tell them that a decision had been made to close the gold mines in order to transfer the released labor to the copper mines. In justification of such an order, Mr. Lipkowitz of WPB's Labor Division stated that there were between 10,000 and 12,000 men who were then employed in the gold mines. The gold mine owners immediately protested that the figures stated were completely inaccurate; that the gold mines had already lost their most active men who had either gone to the shipyards and aircraft plants on the West Coast or had been drafted into the Armed forces; that the miners remaining in the gold mines were settled residents of their communities and that it was doubtful that they would move away to work in the copper mines if the gold mines were closed.

In response to General McSherry's statement that the need for underground workers in the copper mines was urgent, Mr. Bjorge of Homestake pointed out that it was unreasonable to hope that gold miners would accept the jobs which the nonferrous metal miners were already leaving for more desirable employment, and that it was more likely to expect that miners forced to leave Homestake would go to the same type of more desirable jobs to which the copper miners were going. He also pointed out the great hardships which the closing of the Homestake mine would inflict upon the local communities and upon the State of South Dakota. Similar arguments against a closing order were advanced by the other gold mine operators and by the Senators and Representatives in attendance. Messrs. Hatch, Heikes and Ayer, all of WPB, questioned the possible effectiveness of the proposed order. General Clay, representing the Army, spoke strongly in support of a closing order. Late in the meeting, Wilbur A. Nelson undertook to determine how

many miners and muckers would actually be released by a closing order.

37. On October 3, 1942, Wilbur Nelson furnished Mr. Batt with figures which he had obtained directly from the gold mine operators. He reported that while there were 3,270 workers employed by gold mining companies at that time, only 896 of them were hardrock miners and muckers. He further reported that approximately 300 of these men would be needed to maintain the buildings, machinery and equipment in repair, and the access and development workings safe and accessible as provided for under the proposed order. His report concluded that if all the gold mines and dredges in the United States were put on a stand-by basis, it would make available only about 600 miners and muckers for other mining enterprises "provided they [could] all be induced to go into other mines."

38. On October 1, 1942, Mr. Batt sent the following memorandum to Donald Nelson, Chairman of the WPB:

> The more I study the gold mining situation, the more uncertain I am as to the form which a restriction of operations should take. Complete closing without exceptions will produce very serious economic dislocations, and the total possible gain in men is a small figure. If the question comes up in your press conference, I would suggest that you refer to the need for miners and the lack of need for gold, and say that the matter is being studied from all angles.

39. On October 2, 1942, Under Secretary of War Robert P. Patterson sent Mr. Batt the following letter:

> I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.
>
> If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's approval, and I believe that Mr. Forrestal will do the same for the Navy.

40. On October 5, 1942, Under Secretary of War Patterson and Under Secretary of the Navy Forrestal sent the following memorandum to Donald Nelson:

> The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.
>
> The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided.

41. The matter was presented to the War Production Board at its meeting on October 6, 1942. The minutes of that meeting, insofar as here material, and which accurately reflect what transpired, read as follows:

> Mr. Batt reported that the matter of shutting down United States gold mines had been receiving detailed attention. On conferring with Brigadier General McSherry of the War Manpower Commission and representatives of the gold mining companies, it had been found that at present the gold mining industry employs 3,270 workers; 750 are engaged in dredging and only 896 are hard-rock miners. Loss of labor to the Services and to war industries, and higher costs have already sharply curtailed operations of all domestic mines except Homestake. Homestake's labor force has dropped from a peak of slightly over 2,000 workers to 1,876, including lumbermen and machine shop workers. If Homestake were shut down except for standby operations, all but 500 of these workers could be released for work elsewhere. Lead and Deadwood, South Dakota, with aggregate populations of 16,000 are totally dependent on the mine's operation.
>
> Although it has recently emphasized other forms of production, the State Department, because of broad in-

ternational considerations, heretofore has urged that gold mining in South Africa and Honduras be maintained. The South African economy and the stability of the present government are largely dependent on gold mining. The basic industries of Honduras are the cultivation of bananas, of which exportation to the United States has been reduced to 20 percent of normal, and gold mining. Mr. Leon Henderson reported that Canadian gold mining is being curtailed very sharply. The Vice President pointed out that questions pertaining to production of gold abroad should appropriately be discussed with the Board of Economic Warfare.

Mr. Batt stated that after investigation he recommends that: (1) All nonessential domestic mining of gold other than that incident to the mining of critical metals be stopped as soon as possible and not later than within 60 days; and (2) gold mines not producing critical metals be allowed to continue standby maintenance operations lest it be impossible to reopen them at the close of the war.

General Somervell stated that because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, failure to stop gold production immediately would be inexcusable.

After further discussion it was agreed that:

> An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition.

42. Those in attendance at the October 6, 1942, meeting of WPB to consider the gold closing order included Donald M. Nelson, W. L. Batt, A. I. Henderson, Wilbur A. Nelson, Under-Secretary of War Robert P. Patterson, Lieutenant General Brehon B. Somervell, and Paul V. McNutt, Chairman of the War Manpower Commission. The meeting was also attended by numerous other persons who were there for the purpose of considering the so-called feasibility program. The gold curtailment order was discusssed for some fifteen to thirty minutes and it was decided to issue the gold closing order immediately.

43. On October 8, 1942, the WPB issued Limitation Order L–208 directing that operations at gold mines not holding

serial numbers under Order P–56 be discontinued. Order L–208 read as follows:

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

Section 3093.1—LIMITATION ORDER L–208

(a) *Definitions.* For the purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.

(b) *Restrictions upon production.*

(1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment

of such placer mine, after the issuance date of this order, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in subparagraph (b) (3) above.

(e) *Records.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

(f) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to:

War Production Board
Mining Branch
Washington, D. C. Ref: L–208

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or fur-

nishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of Priorities Regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the Priorities Regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R 2719; sec 2 (a), Pub. Law 671, 76th Cong., as amended by Pub Laws 89 and 507, 77th Cong.)

Issued this 8th day of October, 1942.

Ernest Kanzler
Director General for Operations

44. Coincident with the issuance of L–208, the War Manpower Commission issued a directive relating to the employment of workers previously employed as production or maintenance workers in gold mines. This directive was issued on October 7, 1942, by Paul V. McNutt, Chairman, and stated in material part as follows:

I. On and after the date hereof no employer shall hire in, or hire for work in, Alaska or any State west of the Mississippi River, any person who on or after October 7, 1942, has ceased to be employed as a production or maintenance worker in connection with gold mining except upon referral of such worker to such employer by the United States Employment Service.

II. No person who on or after October 7, 1942, has ceased to be employed as a production or maintenance worker in connection with gold mining shall be referred by the United States Employment Service to any work in Alaska or a State west of the Mississippi River other

than work in essential nonferrous metal mining, milling, smelting, and refining activities unless such referral would be in the best interests of the war effort or unless the denial of such referral would entail an undue hardship upon the individual concerned, as determined in accordance with regulations and standards prescribed by the Chairman of the War Manpower Commission.

45. Immediately following the issuance of Order L–208 on October 8, 1942, a statement was issued by Paul V. McNutt, Chairman, War Manpower Commission, and Donald Nelson, Chairman, WPB, appealing to all workers in gold mines to transfer to nonferrous metal mines and not to other war industries.

46. The dominant consideration by Chairman Donald Nelson of WPB in the issuance of Limitation Order L–208 was the releasing of mine labor from the gold mines for employment in mines that were producing other metals, such as copper, which were in short supply and urgently needed in the war program.

47. The closing of the gold mines did very little to relieve the manpower shortage in the nonferrous metal mines because (1) a relatively small number of the type of workers needed in those mines, i. e., hardrock miners, were released (finding 37); (2) a number of these men were required to remain in the gold mines to keep them in safe condition; (3) the older and more settled experienced miners remained in their home communities doing what they could to make a living or remaining idle; (4) most of the younger hardrock miners released sought employment in the better paying war industries, construction projects, or were drafted in the armed services. Approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year.

48. Although the preamble to the order stated that it was issued to conserve critical materials, supplies and equipment needed for defense and in short supply, the only part of the order itself which attempted to effect such a conservation was that part which prohibited the gold mines from acquiring such materials, and that acquisition had already been effectively curtailed and in large part cut off by existing priority orders (finding 17). That part of the order which

prohibited the use by the gold mines of the supplies, materials and equipment and facilities they owned and had on hand did nothing to assure that those materials, etc., would be available for use by more essential industries of by the Government. The order left the owners free to dispose of them as they pleased.

49. Prior to the issuance of L–208, and afterwards until the end of the war, critical materials, machinery and equipment subject to allocation and control by WPB were shipped in substantial quantities to foreign countries for use in their gold mining industry. These countries included South Africa, Canada, Honduras, Nicaragua and Columbia, in all of which gold mines continued to operate throughout the war.

50. On and prior to October 8, 1942, officials of WPB who were responsible for the issuance of L–208 knew (1) that existing priority orders insured that the gold mines would not receive any critical materials needed by more essential users; (2) that the closing of the gold mines would release only a small number of hardrock miners and helpers; (3) that no agency of the Government had the power to compel these men to accept employment in the nonferrous metal mines; (4) that in all likelihood unemployed gold miners would accept employment in shipbuilding, aircraft and construction industries rather than go to work in the nonferrous metal mines where wages were low and working and living conditions poor; (5) that L–208 was not in fact directed at the known reasons for the shortage of underground workers in the nonferrous metal mines, i. e., low wages, bad working and living conditions, and the refusal of Selective Service to defer miners; (6) that a substantial number of the employees of the gold mines were middle-aged men with families who owned their own homes and would not leave their communities if any alternative were possible; (7) that in many instances the communities in the vicinity of gold mines were entirely dependent upon the operation of the mines for their continued prosperity; (8) that the deeper mines were likely to deteriorate and become flooded if closed down, and that many operators would not be able to afford the cost of keeping their mines safe and accessible or their machinery, equipment and buildings in repair during a long period of unproductivity.

51. It is reasonable to conclude that in issuing L–208 WPB acted without any justifiable anticipation that the order would bring about the transfer of more than an insignificant number of hardrock miners to the nonferrous metal mines.

52. On October 10, 1942, 21 United States Senators from 12 gold-producing Western States sent the following letter to the President of the United States:

> Some days ago the War Production Board announced a decision to close all gold mining operations in the United States. This order was made by the Board against the emphatic protest of those representing the largest mining operations engaged in the mining of gold from lode and placer operations.
>
> The largest mining operations affected by this order are in the states of South Dakota, California, and Colorado.
>
> The Homestake Mine in South Dakota has been operating for some sixty years and has supported a community immediately surrounding the operation of some sixteen or eighteen thousand souls.
>
> The Mother Lode Mines in California extend along the western base of the Sierra-Nevada range of mountains for a distance of 150 miles or more. These mines have been depended upon by communities the total of which would approximate one hundred thousand souls.
>
> The population dependent on the Cripple Creek Mines of Colorado has varied from time to time and is not definite at this moment. Suffice it to say that it would be in the neighborhood of five or six thousand souls.
>
> The economy of communities and states in which these mining operations are located has depended largely upon these operations, in that all of these mines have contributed materially by way of taxation to the states, counties, and municipalities in which they are located.
>
> The labor employed by these mining operations in the respective states has been to a very large extent contributed by the communities that surround the respective mine operations. Homes have grown up through the years in each of these communities, and sons followed their fathers into the mines.
>
> The record made before the War Production Board discloses that in each of these mining communities the young men, that is, men under 50 or thereabouts, have already either gone into the military branches of the United States, or have gone into war activities where alluring wages attracted them. The record discloses that the men now engaged in mining operations in the

mines affected by the order are by and large about 50 years of age or over. The record before the War Production Board discloses that the men now engaged in mining operations in these localities have, with but rare exception, been employed in the mines of the respective localities for many years.

It is stated that the object of the order made by the War Production Board closing down these gold mines is because of a shortage in the supply of critical materials for defense, and the making of the order is supported by the theory that the labor employed in these gold mines will go into mines of copper or lead or zinc.

We respectfully draw your attention, Mr. President, to the record as made before the War Production Board that if all of the gold mines affected by the order of the Board are put on a standby basis, that is, if they are permitted to retain only enough labor to keep the mines from becoming flooded and caved, there will be in all about 2,020 of all types put out of employment.

The record before the Board shows that there may be another 500 men put out of employment from other mines of smaller capacity, making a total of 2,520 men put out of employment from lode mines.

It is estimated that the number of men put out of employment from dredger operations will be about 750 men. The men engaged in dredger operations are as a rule much older than those engaged in lode mining, at the present time.

It is estimated that the total number of men put out of employment by the order of the War Production Board will be approximately 3,270. The record before the Board establishes that of this number about 900 are miners and muckers.

From this number, it is estimated that between 150 and 200 miners and muckers would be necessary to retain the gold mines and dredges in a stand-by condition; hence, not to exceed 750 men, accustomed to actual mining and generally termed "miners" and "muckers" would be available for employment in mines of copper, lead or zinc.

The record made before the War Production Board discloses that miners, who have been for a long time engaged in gold mining, do not go into the mining of other minerals, such as copper, lead and zinc. There are many reasons stated for this custom.

It is emphatically stated before the War Production Board that if this mine labor population is released from

employment in the gold mines in the respective states, only a negligible number, if any at all, will seek employment or remain employed in mining operations of other metals.

The impairment of the morale of communities in the states affected by the order of the War Production Board; the far-reaching effect upon the economic structure of the communities; the irreparable destruction of private property that will be accomplished by the flooding and caving of gold mines; the discouragement and heartache that will come into thousands of homes, many of them the homes of boys now in the military service of this country, but whose parents and relatives remain in the communities affected by this order—all of these things will not be compensated by the negligible number, if any, of mine laborers who will go from the closed mines to communities far remote to engage in other mining activities.

We respectfully draw your attention to the fact that at this very time Great Britain is urging and aiding the production of more gold by the gold mining operators of South Africa.

We respectfully draw your attention to the fact that our neighbor ally in this war, the Dominion of Canada, is going forward and encouraging the production of gold in that country, and in a telephonic communication within the past few days with those in authority on the subject in Canada, the information was received that the Canadian government has no intention of closing down its gold mine operations.

We respectfully urge that no beneficial result inuring to the defense of the United States in its time of war will flow from the order made by the War Production Board closing the gold mines of this country. The record needs no emphasis that great and irreparable injury will result.

We respectfully bring this matter to your attention with the request that you stay the order made by the War Production Board affecting the gold mine operations of the United States, at least until the whole subject of marshalling of manpower and the allocation of labor may be considered, and the vital questions involved, concluded; thus that the gold mining industry of the United States may not be subjected to unwarranted and unusual hardship and injury which may not eventually be considered necessary, and which may not be equitably borne by other industries.

In May 1944, the Policy Analysis and Records Branch of the WPB submitted a report concerning Limitation Order L–208 providing in part as follows:

> It is generally agreed by the WPB divisions concerned with mining activities that a very small percentage of the released gold mine workers actually were employed by other mines. A majority of them probably went into work of greater value to the war effort than gold mining, such as lumbering, agriculture, construction, shipbuilding, aircraft manufacture;[96] but the fact remains that the primary justification for closing the gold mines was to get labor for the production of the strategic metals. Wilbur Nelson, Arthur S. Knoizen, present Director of the Mining Division, and F. H. Hayes, Chief of the Primary Production Branch of the Copper Division, concur in the statement that the number of gold mine workers who went into other mines and remained there for a year or more was not over 100.[97]

[96] A partial analysis based on the records of the Social Security Board, indicates that the released gold mine workers went into a wide variety of occupations, including in addition to those mentioned in the text, coal mining, steel working, communications, transportation, and many others; they scattered, in short, through a fair cross-section of American industry. Letter, John J. Corson, Director, Bureau of Old Age and Survivors Insurance, Social Security Board, to Stacy May, October 22, 1943.

[97] Wilbur Nelson and Arthur S. Knoizen, in interviews with the writer, March 7, 1944; F. H. Hayes, in an interview with writer, March 4, 1944.

FINDINGS RELATING TO PLAINTIFF HOMESTAKE MINING COMPANY

53. Homestake Mining Company (hereinafter referred to as Homestake) is and was at all times herein mentioned a corporation organized and existing under the laws of the State of California.

54. Homestake is and was at all times herein mentioned the owner of patented mining claims covering more than 5,000 acres of mining properties containing gold-bearing ores of great value located in the Black Hills area of South Dakota, near the city of Lead, South Dakota.

55. On October 8, 1942, and for 65 years prior thereto, Homestake was and had been engaged in the business of mining, processing and selling gold, and in 1942 was the largest gold producer in the United States.

56. On October 15, 1942, Homestake notified its employees of the issuance of Order L–208 and informed them of the necessity of concluding its gold-mining operations pursuant

to the order. Homestake urged such employees as would be released to consider the opportunities for employment in the copper mines.

57. Pursuant to the terms of Order L–208 Homestake discontinued breaking new ore on October 15, 1942, and began to lay off miners on that date.

58. On or about October 17, 1942, Homestake appealed to WPB, requesting permission to continue mining operations on the ground that Order L–208 would work an exceptional and unreasonable hardship upon it. On November 25, 1942, WPB decided the appeal, granting Homestake only limited relief. The WPB advised Homestake of this decision in a letter dated November 25, 1942, which stated in part as follows:

> Permission granted to remove and mill broken ore from underground and refill the stopes with suitable material during a period of six months beginning December 8, 1942, provided that no more than 60 employees are at any time assigned to or used in such operations and provided further that workers shall not be assigned to such operations when the War Manpower Commission finds that they are needed in mining operations elsewhere. Permission is denied to break any new ore or to proceed with any development work or any new operations in or about the Homestake mines.

59. Homestake, with the aid of the limited additional personnel authorized by WPB, continued the hoisting and processing of ore already broken from on or about October 15, 1942, until the latter part of May 1943. After June 1, 1943, the Homestake gold mine was closed down for all purposes, except necessary maintenance, until on or about July 1, 1945. It reopened on that date and has operated continuously since then.

60. On October 8, 1942, the life of operations of Homestake's gold mine based on ore bodies, indicated by reserves of ore in sight and ore that could be expected from development, was at least 20 years at the then current rate of mining.

61. Homestake, at the time of its founding in 1877, was located in an isolated part of the United States and as a result was required to maintain a policy of self-sufficiency. From its early days it established a program of maintaining larger inventories than customary in most mining en-

terprises. Prior to October 8, 1942, Homestake had acquired extensive timberlands which provided lumber for the mine, and continued this program up to the time of the issuance of Order L–208. Prior to October 8, 1942, Homestake also had developed a coal mine, and was producing its own electric power.

62. In October of 1942, Homestake had recently completed two deep mine shafts equipped with large modern hoists, and had erected a new lumber mill. Its steam power plant was relatively new and its ore processing mills were in excellent operating condition.

63. On October 8, 1942, Homestake maintained its own foundry and machine shops used in the fabrication and repair of a variety of mining and processing equipment. In addition, Homestake was capable of supplying all of its own needs with respect to mine timber, coal, and electric power.

64. The chief items of materials and supplies used by Homestake in its mining and milling operations consisted of pipe, rail, rock drills, parts for rock drills, drill steel hoisting ropes (wire), electrical wire, cyanide, lime, shoes and dies for stamp mills, balls and rods for grinding mills, liners for grinding mills, and cones and mantles for crushers. Items of necessary equipment included locomotives, mine cars and mechanical shovels.

Homestake's inventory of these and other necessary materials and supplies was sufficient to operate its mine during the entire period of the closure. This did not include items such as dynamite and explosives. Only a three months' supply of dynamite was on hand on October 8, 1942, but it was readily available without restriction.

65. At no time did WPB requisition or order Homestake to surrender or transfer any of its supplies, equipment or machinery, nor did it make any inquiries regarding the amount, nature or availability of Homestake's supplies, equipment and machinery, although the Board was furnished with an inventory of supplies on hand and other information relating to equipment and machinery.

66. The working conditions at Homestake and the living conditions in the communities surrounding Homestake in 1942 were superior to those at the nonferrous metal mines to which the Government sought to transfer the Homestake

miners. Homestake employees enjoyed free medical and hospital services, group insurance, pensions, recreational facilities, and many of the older miners owned their own homes. In 1942, approximately 440 of Homestake's employees had seen more than 21 years of service with the mine, and some had been employed there for more than 40 years. For these reasons, Homestake had enjoyed greater employment stability than the nonferrous metal mines despite the lure of higher pay in the war industries.

67. In October 1942, Homestake had sufficient labor available to operate at full capacity. Even in the event of reduction of available manpower Homestake could have maintained normal production levels by using mining techniques requiring less labor and by increasing its workday from seven to eight hours.

68. The Homestake Mining Company released 437 men from its employment during the period from the issuance of L–208 on October 8, 1942, to a date shortly prior to November 12, 1942. Of these 437 employees, 391 came from the mine department, 21 from the metallurgical department, 21 from the mechanical department, and 4 from the carpenter department. Of the 391 employees from the mine department, 183 were classified as miners on Homestake's payroll. And of these 183 miners, 39 had less than six months' experience. Of the 437 released, 110 men did not register with the United States Employment Service. Of the remainder, 207 of them were placed by the United States Employment Service in other mining work as of a date shortly prior to November 12, 1942.

Homestake reported to the U. S. Social Security Agency that it had in its employ during the third quarter of 1942 a total of 2,129 employees. In its report for the fourth quarter of 1942, the company reported that 921 of these employees received less wages than they had received in the preceding quarter, which indicates that these employees were separated from the company's employ before December 31, 1942. Of these 921, there were 401 also reported by another employer, although not previously so reported, which indicates that these employees transferred to such other employers after leaving the Homestake Mining Company. These figures did not include transfers after Decem-

ber 31, 1942, although Homestake continued limited operations through that date.

69. In October 1942, Homestake was the largest single source of potential nonferrous metal mining labor. Representatives of the United States Employment Service, immediately following the issuance of L–208, attempted to induce released workers to accept employment at the Anaconda copper mine at Butte, Montana, and the Climax Molybdenum mine at Climax, Colorado, both about 500 miles from the Homestake mine.

Fifty-one Homestake employees accepted employment at Climax. Forty-one stayed less than six months and only six employees remained as long as one year.

One hundred and seventy-eight Homestake employees accepted employment at Anaconda, and of these more than 100 left before the end of a year. A great many Homestake employees never transferred to nonferrous metal mines but remained at the mine doing maintenance work, remained idle at home, or went into other pursuits. As early as November 1942, some of the miners who had been assigned to jobs in other mining districts began returning to Lead.

70. The properties of Homestake were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business.

71. The closing of the Homestake mine pursuant to Order L–208 had far-reaching and drastic repercussions in the city of Lead and the surrounding communities. The population declined sharply, more than 750 homes and apartments were left vacant and boarded up, and 36 business establishments which had served the communities were left vacant.

72. In the years immediately prior to the issuance of Order L–208, the State of South Dakota received about $1,000,000 per year, or approximately ten per cent of its annual revenues, from Homestake. The State was deprived of this source of revenue by the order closing the gold mines.

73. Without acquiring new machinery or repair parts, or supplies on which there were restrictions concerning acquisition, and with a reduced labor force, Homestake could have operated profitably during the period of closure.

74. By reason of the issuance of Order L–208 Homestake was deprived of the use and benefit of ownership of its gold-

mining properties, to wit, the right to obtain gold from the ore bodies on its properties and to sell such gold.

75. No compensation has been paid to plaintiff Homestake by defendant for the closing of its mine as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF CENTRAL EUREKA MINING COMPANY (A CORPORATION)

76. Central Eureka Mining Company (hereinafter referred to as Central Eureka) is a corporation organized and existing under the laws of the State of California, with its principal places of business located in Sutter Creek, Amador County, California, and in San Francisco, California.

77. On October 8, 1942, Central Eureka owned approximately 641 acres of gold-bearing land located at Sutter Creek, Amador County, California. On that date the mine employed a total of 117 men, of whom 73 were classified as underground workers.

The average age of the total number of employees was 41.74 years; 74.36% of the employees were married and had an average of 2.64 dependents. These employees had resided in the community wherein the mine was located for an average of 4.26 years, and 31 of these employees owned their own homes in that community.

78. Immediately following the issuance of L–208 on October 8, 1942, all but 64 men left the mine, that group having been retained by the company to maintain the mine until January 1943, when the National War Labor Board ordered that thereafter the company would not be authorized to employ more than 42 men in the maintenance of the mine. The record does not disclose how many of either the 64 or the 42 men were underground workers.

79. Prior to October 8, 1942, Central Eureka Mining Company was engaged in the successful operation and development of its gold mining property at a profit. In the five-year period immediately preceding the issuance of L–208, the company paid $355,414.04 in Federal and State taxes. During that same period of time the company paid to its shareholders dividends in the amount of $1,182,000.

80. On October 8, 1942, Central Eureka had an inventory of supplies on hand which would have enabled the mine to operate for a period of two or three years without replenishment.

81. Central Eureka's mining equipment included on October 8, 1942, machine shops, electrical shops, blacksmith shop, carpenter shop, an assay office, a complete mill from primary crush to cyanidation, its own source of timber, automotive and all other necessary equipment required to carry out mining and servicing of the underground workings and the extraction of gold from ore bodies.

82. During the period October 8, 1942 to June 30, 1945, while L–208 was in effect, Central Eureka, which had been producing gold for about 80 years, could have continued to operate its mine on a satisfactory basis with a reduced force of men. It had on hand sufficient inventory for that purpose and had approximately 100,000 tons of blocked out ore (exposed on four sides) in reserve and had additionally inferred ore and probable ore in reserve which would substantially increase the 100,000 ton figure.

83. The properties of Central Eureka Mining Company were useful for no other purpose except the production of gold, and were adaptable to no use other than the conduct of a gold mining business. The mine was closed by reason of compliance with L–208.

84. Within six weeks after the issuance of Order L–208, Central Eureka applied for a serial number under P–56 for the operation of a copper-mining project at Battle Mountain, Nevada. Some mining equipment was transferred from its gold mine to this copper project. It was closed down by Central Eureka about the middle of 1943.

85. In addition, Central Eureka leased some mining equipment, including flotation machines and feeders, agitators, classifiers, sand pumps, filters and compressors, to individuals who were engaged in tungsten mining. This material would not have been so leased had it not been for the issuance of Order L–208.

86. On December 9, 1943, Central Eureka, by its general superintendent, wrote the following letter to the Mining Division of WPB:

As General Superintendent of the Central Eureka Mining Company, an Amador County, California gold producer closed under War Production Board Order L–208 and placed on a maintenance basis, I wish to call your attention to our position as well as similar gold operations.

The cost of keeping our mine unwatered and of doing absolutely essential retimbering and repair work is becoming a great burden on this Company's treasury. If it became necessary to abandon the mine entirely and allow it to fill with water, I question seriously whether we or anyone else would be able to undertake a rehabilitation project at the present price of gold.

It appears to me that the situation could be helped very much if we could have the sympathetic consideration of the people charged with the administration of Order L–208 in a relatively small departure from the provisions of the Order. Such departures might include (1) the hiring temporarily or permanently of a few additional men, either as replacements or to meet emergencies, (2) the permission to extract a small amount of ore to help out the heavy deficit of the maintenance operation and to allow variations from time to time in the tonnage extracted, and (3) the consideration of use or exchange of a small amount of strategic materials as required. So far, we have been unable to make Washington officials understand these operating problems. I do not believe that such misunderstanding is the result of being arbitrary but is probably due to the fact that they are too far away from our operations to see the true picture. My thought is that if the administration of Order L–208 could be decentralized and placed in the hands of some Western representative—either Mr. Lane in Denver or Mr. Keating in San Francisco—our operations would receive a more sympathetic consideration based upon a personal understanding by the Administrator. I feel personally that this could be done without interfering in any material way with the purposes of Order L–208, understanding of course that the purpose of Order L–208 is the conservation of manpower and strategic materials for the war effort.

It is of vital concern to this Company and to this community to keep our operation alive if at all possible. The lack of authority given local administrators with respect to Order L–208 seems to unfairly discriminate against the gold mining industry as compared to other forms of business which have been forced to indirectly reduce operations. A local administrator with adequate authority could help materially to clear up this feeling

on the part of the gold operators and of the citizens of the gold mining communities.

Your early consideration of this request would be greatly appreciated.

87. On December 17, the WPB acknowledged and on December 22, 1943, replied to the above letter in part as follows:

> Supplementing our letter of December 17, your problem has been discussed very thoroughly in conference, and we fully understand your problems on maintenance in keeping your mine open and ready for operation.
>
> We suggest that you file an appeal from this order, stating your problems in detail, advising what is involved in getting your mine in operation and maintaining it on a minimum basis. In your appeal, also state whether manpower is available, and if so, can you get certification from the War Manpower Commission to use these men if they are not needed in other essential war industries.
>
> We assure you that as soon as this appeal is filed, we will give it immediate consideration to see what can be done to give you some relief under the order.
>
> We also suggest that you file with your appeal, the possible requirements of material of all types that you will need for approximately a year. If this is not possible, six months will suffice.
>
> * * * * *

There is no evidence of an appeal under L–208 other than the letter quoted in finding 86.

88. By reason of the issuance of Order L–208, Central Eureka was deprived of the use and benefit of ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

89. No compensation has been paid to Central Eureka by defendant for the closing of its mine as hereinbefore described.

90. On June 30, 1945, the WPB revoked Order L–208. Thereafter in 1947 or 1948 Central Eureka reopened its mine and has operated it continuously since.

FINDINGS RELATING TO PLAINTIFF IDAHO MARYLAND MINES CORPORATION

91. Idaho Maryland is now and was on October 8, 1942, and at all times hereinafter mentioned has been, a corpora-

tion duly organized and existing under the laws of the State of Nevada.

92. Idaho Maryland is now and at all times herein mentioned has been the owner in fee of certain gold-mining properties known as the Idaho Maryland Mines, consisting of approximately 8,000 acres of gold-bearing lands situated in the Grass Valley Mining District in the County of Nevada, State of California, together with all necessary mining plant and equipment located on said lands.

93. Idaho Maryland operated the above-described mining properties for many years prior to October 8, 1942, and continuously since July 1, 1945. It was recognized on October 8, 1942, as the second largest gold mine in the United States in terms of ore removed and treated.

94. Idaho Maryland's mining equipment located on said lands included on October 8, 1942, machine shops, electric shops, welding shops, blacksmith shop, carpenter shop, cyanidation plant and smelting plant, a sawmill and other mills, shops, automotive and all other necessary equipment required to carry out mining and servicing of the underground workings and the extraction of gold from the ore bodies.

95. It would not have been necessary for Idaho Maryland to acquire, during the life of L–208, any critical materials, supplies, equipment or facilities to enable it to continue operation on a profitable basis, because, (1) the mine was a fully developed mine comprising extended drifts, cross-cuts, raises and winzes, fully equipped with a large amount of modern mechanical equipment, including an efficient hoisting layout; (2) the company owned sufficient equipment in good condition, a large inventory of supplies and materials necessary for operating the mine, including large quantities of pipe and rail, steel, drill steel, building machine repair parts, tires, tubes, repair parts for milling machinery, valves, pipe fittings and miscellaneous supplies, a large supply of mercury and all other materials required to operate the mine. At no time during the war were industrial or commercial explosives, including dynamite, fuses and caps, subject to priority restrictions, and were available in large supply in the open market.

96. During the period of close down, Idaho Maryland was not wholly dependent upon the use of the mining machinery and equipment actually owned by it on October 8, 1942. There was a considerable quantity of secondhand mining machinery available at all times in California which could have been purchased by Idaho Maryland had the necessity arisen. Secondhand mining machinery was not rationed and was freely obtainable in the open market.

97. Idaho Maryland owned and operated its own cyanidation plant, but such operation was not essential to the continued operation of the mine as a gold mine. Two-thirds of the gold content of the ore is and was on October 8, 1942, recovered at the Idaho Maryland Mine in the amalgamation process, and prior to subjecting ore concentrates to the cyanidation process. Some of the free gold was recovered on the jig table prior to the amalgamation process. The Idaho Maryland mining properties are peculiar in that the ore contains considerable free gold. The cyanidation process is a further treatment of the residue of the concentrates to recover the remaining gold. The concentrates could have been sent to the American Smelting and Refining Company Smelter at Selby, California, for smelting and the final recovery of the remaining gold therefrom. The Selby smelter operated during the entire period of the war.

98. Idaho Maryland operated its own saw mill and had its own supply of timber. The mine obtained its power in 1942 from the Pacific Gas and Electric Company and continued to use such power throughout the period of shutdown. There was no shortage of electric power at the mine nor was it curtailed or restricted during the shut down but was available at all times.

99. The operations at Idaho Maryland were curtailed due to the loss of manpower between December 1941 and October 8, 1942. The payroll was reduced from over 800 employees to 212 employees between those dates. As the separations of employees reduced the number of employees, it became necessary before the closedown ordered by L–208 to alter their mining methods so as to more effectively utilize the employees who had stayed.

100. On October 8, 1942, 116 of Idaho Maryland's remaining employees were underground workers. The average age

of all employees as of October 8, 1942, was 47.7 years and 43 of the underground men were over the age of 50. If *all* of Idaho Maryland's underground workings had been kept safe and accessible as permitted by L–208, none of the 116 underground workers would have been released.

101. During the period of October 8, 1942, to June 30, 1945, while Order L–208 was in effect, Idaho Maryland could have continued to operate its mine, except for the prohibition contained in Order L–208, on a satisfactory basis with a reduced force of men by resorting to shrinkage stoping, which is a method of operation requiring fewer underground men. This method of operation has been customarily followed in the Idaho Maryland Mine. It is a method customarily used in other gold mines, such as Homestake. It would also have been possible to operate with a reduced crew by eliminating extensive development work. Extensive development work is not necessary in a mine such as Idaho Maryland, located in a well-known mineralized area such as Grass Valley Mining District. In fact, Idaho Maryland has operated continuously without the necessity of having blocked out proven ore bodies.

102. Upon the issuance of Limitation Order L–208 on October 8, 1942, Idaho Maryland, under threat of criminal prosecution for failure to comply therewith, immediately notified its employees that the mine was being closed down and discontinuing work. In compliance with said order Idaho Maryland completely closed down the operation of its gold-mining properties and suspended all mining production from and after the period prescribed in said Order L–208, to wit, on October 15, 1942.

103. The properties of Idaho Maryland are, and were, useful for no other purpose except the production of gold, and said mining properties were adaptable to no profitable use other than the conduct of a gold-mining business and were not capable of being used for any purpose other than the production of gold.

The blacksmith shop, machine shops and other shops and equipment of Idaho Maryland, which were used for the repair and maintenance of mining machinery, were not capable of being utilized in the mass production of any item and were

not devoted to any other use during the period of shutdown following the issuance of L–208.

104. With a greatly reduced labor force and without acquiring any critical material, supplies, equipment or facilities subject to government control, Idaho Maryland could have operated its mining properties on a profitable basis during the period L–208 was in effect.

105. On October 8, 1942, there were 81 employees who had terminated their employment with Idaho Maryland after October 8, 1942, who were thereafter reemployed by that firm, which obtained a record of the employees' intervening employment in most but not all instances. Of the 69 as to which the firm had a record of intervening employment, 6 were employed in other mining activities during some or all of the time they were out of the company's employ, 8 were in military service, 4 were employed in the Miners' Foundry, Nevada City, California, 6 worked with the railroads, 4 were employed in shipyards, and the remainder as to which there was information were engaged in other types of employment.

106. Grass Valley, Nevada County, California, located near Idaho Maryland's gold mining properties, was wholly dependent upon the operation of the gold mine for its continued prosperity. The closing of the mine caused considerable community dislocation and individual hardship. Since 1848, the principal occupation of the inhabitants of the communities of Grass Valley and Nevada City had been gold mining.

107. Pursuant to an appeal taken by Idaho Maryland Mine to the War Production Board, the mine was permitted to complete a second exit between the mine and the Brunswick Mine which was required by California State Law. On December 13, 1943, Idaho Maryland filed a second appeal calling to the attention of the Board specific conditions which existed underground in the mining properties by reason of the shutdown. The underground workings were caving and collapsing and the mine contended that it was essential for the protection of the underground workings that mining operations be resumed forthwith. On May 3, 1944, Idaho Maryland was permitted by WPB to resume operations on a limited basis with not over 200 men who must be over 40 years of age and not working for other industries. Produc-

tion permitted was limited to 7,800 tons of ore per month but Idaho Maryland was not able in 1944 to reach that production because of the time it took to prepare for production and to open up the necessary ground workings due to the destruction which had already occurred to the mine. A third appeal on November 24, 1944, asking permission to hire additional men was denied.

108. By reason of the issuance of Order L-208, Idaho Maryland Mine was deprived of the use and benefit of ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

No compensation has been paid to Idaho Maryland by defendant for the closing of its mine as hereinabove described.

FINDINGS RELATING TO PLAINTIFF ORO FINO CONSOLIDATED MINES, INC.

109. The petition as to this plaintiff was originally filed on February 8, 1950, in the name of Oro Fin*a* Consolidated Mines, Inc. Thereafter on September 9, 1952, an amended petition in this case was filed in the name of Oro Fino Consolidated Mines, Inc.

110. Oro Fino Consolidated Mines, Inc., was incorporated under the laws of the State of Nevada on January 4, 1950.

111. Under date of September 5, 1935, Hazel P. Gridley leased to one J. C. KempvanEe certain gold mining property in Ophir Mining District, Placer County, California, known and described in the lease as the Or*a* Fin*a* Mine. J. C. KempvanEe thereafter operated this property as Oro Fino Consolidated Mines, but this was simply a trade name, and the lessee continued to be the said KempvanEe.

112. Mr. KempvanEe was operating said gold-mining properties on October 8, 1942. On November 16, 1942, he requested permission of the War Production Board to continue the removal and milling of broken ore until January 15, 1943, representing that there were then 1,912 tons of broken ore in the mine. Such permission was granted by the War Production Board under date of December 2, 1942. The record does not disclose when operations at the mine

actually ceased, but it was apparently prior to March 27, 1943. The mine has never operated since that date.

113. As of October 8, 1942, there were approximately 11 employees in the mine as contrasted with about 40 in "normal" times. The record does not disclose the employments into which these men went following the closing of the mine, although it does show that as of November 8, 1942, one of these employees was awaiting a call to duty in the armed forces.

114. There is no evidence in the record as to the amount of machinery or equipment in the mine as of October 8, 1942, or as to the availability of materials for the maintenance of such machinery or equipment. The mill had been newly erected in 1938, and there were certain parts available for its maintenance, although it does not appear how long the mill could have continued operating without replenishment of this inventory of parts. The record does not indicate the disposition, if any, which was made of these parts and equipment following the closing of the mine.

115. The properties of Oro Fino were useful for no other purpose than the production of gold and were adaptable to no other use than the conduct of a gold mining business.

116. By reason of the issuance of L–208, Mr. KempvanEe was deprived of the use and benefit of the gold mining properties leased by him, i. e., the right to mine and sell gold.

117. In 1948 a Mr. MacBoyle, Mr. KempvanEe's financial backer, died. Mr. KempvanEe then turned to Mr. Nugent for financial assistance as there were certain royalty payments under a lease and certain other expenses recurring. Mr. Nugent agreed to furnish such assistance and did so. He suggested that the operation be incorporated. On January 4, 1950, Oro Fino Consolidated Mines, Inc., was organized. On February 2, 1950, Mr. KempvanEe assigned all his right, title and interest in the lease of the mining property from Mrs. Gridley to Oro Fino Consolidated Mines, Inc. The assignment provides in part as follows:

> The undersigned J. C. KEMPVANEE does hereby sell, assign, transfer and grant unto ORO FINO CONSOLIDATED MINES, INC., a corporation, all right, title and interest in and to that certain mining agreement and the real property therein described and all rights arising by virtue of said agreement, dated September 5, 1935, by and between

HAZEL P. GRIDLEY, a widow, designated at lessor and J. C. KEMPVANEE, designated as lessee, * * *

Said agreement is hereby incorporated herein and made part hereof for all purposes as though fully set forth herein.

118. No compensation has been paid to Mr. KempvanEe or to Oro Fino Consolidated Mines, Inc., by defendant for the closing of the mine as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF ALASKA-PACIFIC CONSOLIDATED MINING COMPANY

119. Alaska-Pacific Consolidated Mining Company (hereinafter referred to as Alaska-Pacific) has been since prior to October 8, 1942, and still is a corporation organized and existing under the laws of the State of Washington. Alaska-Pacific is the successor in interest by way of merger of two predecessor corporations and has been, since 1938, the sole operator of the mining properties referred to hereinafter.

120. Alaska-Pacific is the owner and operator of certain mining properties located in the Willow Creek (Wasilla) Mining District in the Territory of Alaska. With the exception of two groups of mining claims hereinafter noted, all of Alaska-Pacific's properties on October 8, 1942, and thereafter were held in fee or by location notices which later matured into patents in fee issued to Alaska-Pacific by the defendant. As to one of the excepted groups, that known as the "Alaska Free Gold" claims, bearing General Land Office Survey No. 980, Alaska-Pacific held the mining rights on October 8, 1942, and has continued to hold them since then, by virtue of a lease and royalty agreement, coupled with a purchase option, which does not expire until 1961. The other excepted group, namely, the Hamburger, Red Eye and Weeny claims, were held by Alaska-Pacific on October 8, 1942, and are still so held by virtue of location notices.

121. On the aforesaid properties, Alaska-Pacific, since 1938, and its predecessors before them, operated an underground or lode mine, consisting of about 5 miles of underground workings with two entries.

122. Geographically, Alaska-Pacific's mine is located about 20 miles from Wasilla and 28 miles from Palmer, in an isolated section of the Wasilla precinct, there being no other

inhabitants except a few miners employed in neighboring mines. Except for timber which was purchased locally, all supplies, including foodstuffs, were imported from the States. These supplies moved by ship to the port of Seward, thence by railroad a distance of about 400 miles to Wasilla and thence by truck to the mine. Because of climatic conditions, as a result of which the road was often blocked, the isolation of the mine and the uncertainty of steamship schedules, Alaska-Pacific customarily followed a practice of carrying a substantial inventory of parts, equipment and supplies. At the time of the closure of the mine by virtue of Order L–208, Alaska-Pacific had in inventory, parts, equipment and supplies sufficient to permit continued operations for at least one and one-half years, special efforts having been made to accumulate a substantial inventory not only because of the foregoing factors but in anticipation of possible shortages.

123. Because of its isolated location, a company village was maintained at the mine, consisting of the mine and mill buildings, various warehouses, shops, dormitories, a school and an office building, a store, a messhall and various recreation facilities. All buildings were of frame construction and were serviced with central underground water and sewage systems. Because of severe winter conditions with snows ranging to 25 feet in depth and temperatures ranging to minus 50 degrees, and because of heavy rains in other periods of the year, constant maintenance and attention to surface installations were required to prevent early deterioration and serious damage from the elements.

124. Normally, Alaska-Pacific operated its mine with a crew of about 125 men. In October of 1942 it had a mining crew in its employ of 101 men. Of these, only three had experience in mining other than gold mining, that being in the employ of either of the two coal mines then operated in Alaska.

Aside from the two coal mines, there were no other types of mines in Alaska except gold mines.

125. Alaska-Pacific not only produced gold from its mine but also, as a kind of byproduct, a type of concentrate essential to the smelting of copper. Alaska-Pacific's concentrates were shipped to the Tacoma Smelter, Washington, and furnished about 10 percent of its requirements.

126. Under date of October 15, 1942, Alaska-Pacific submitted an appeal to the WPB for relief from the provisions of Order L–208. This appeal emphasized:

* * * * *

> First: The position of the company as a tungsten producer, actually and potentially.
>
> Second: The position of this company as the supplier of valuable and necessary materials to the copper smelting operations of A. S. & R.'s Tacoma Smelter.

* * * * *

It also referred to the hardship upon the company and its employees of closing the mine, and requested:

* * * * *

> In the light of these showings, and particularly in view of the progress made by this company in the production of a strategic metal, we again request the Board to restore the P–56 rating which had been revoked by the general order of March 2nd last. If the said rating is granted, the company will agree to curtail its gold production by at least 50% by ceasing development of sections of its mine where no deposits of scheelite in recoverable quantities exist.

* * * * *

The WPB granted this appeal, by telegram reading as follows:

> RE YOUR APPEAL FROM ORDER L–208 YOU ARE HEREBY AUTHORIZED TO CONTINUE OPERATIONS UNTIL DECEMBER 8TH, AT YOUR INDEPENDENCE MINE UNDER THE FOLLOWING CONDITIONS: DURING THAT PERIOD YOU WILL DRILL, BREAK AND DEVELOP, AS RAPIDLY AS POSSIBLE, THE SCHEELITE ORE SHUTE YOU HAVE OPENED, IN ORDER TO SHOW THE MONTHLY TONNAGE OF SCHEELITE WHICH YOU CAN MINE, TREAT AND SHIP TO THE METALS RESERVE COMPANY'S STOCKPILE AT ANCHORAGE (STOP) YOU ARE, UNDER THE TERMS OF THE ORDER, PERMITTED TO REMOVE FROM THE MINE ANY OTHER ORE BROKEN AND IN THE MINE AS OF OCTOBER 15TH, AND MILL THE SAME (STOP) YOU ARE AT THE SAME TIME REQUIRED TO PREPARE THAT PART OF YOUR MINE NOT CARRYING [T]HE SCHEELITE ORE TO BE IN STAND BY CONDITION BY DECEMBER 8TH (STOP) ON OR BEFORE NOVEMBER 30, YOU MUST FURNISH A COMPLETE PROGRESS REPORT TO US ON YOUR TUNGSTEN DEVELOPMENT AND ALSO ON THE AMOUNT OF BROKEN ORE YOU HAVE REMOVED FROM YOUR MINE AND MILLED, WITH METALLIC CONTENT (STOP)

127. Under date of November 27, 1942, Alaska-Pacific submitted to the WPB a report on its scheelite (tungsten) production, as requested in the grant of the appeal. This report pointed out that approximately 2,000 tons of ore had been processed since the grant of the appeal, yielding 113 pounds of gold, 56 tons of concentrates for the Tacoma smelter, and about 20 tons of crude scheelite ore containing at least 80 units of tungsten trioxide. In the letter transmitting the report, Alaska-Pacific stated that:

> * * * By no stretch of the imagination is scheelite likely to become anything more than an important by-product of our gold operation. Actual financial loss will attend the scheelite phase of our operations, and such losses are likely to persist for the entire period during which scheelite is produced, unless subsidies are granted, or scheelite prices raised. * * *
>
> * * * * *
>
> The scheelite situation at Independence is in the same category. Frankly, it is a case of no gold, no scheelite. We cannot waste the economic metal in order to produce the uneconomic one. This company would be hard put to maintain its predominantly gold workings in standby condition and at the same time undertake production of scheelite at a loss, unless income from its gold production was continued.
>
> We submit this letter and the accompanying Progress Report with confidence that the evidence offered will justify the issuance to us, at an early date, of a priority rating which will affectively [sic] suspend L–208 as it may apply to our operation at Independence. In the event that your Board should determine upon action according further time extension in the application of the order, we wish to suggest that not less than six months be accorded us, as any shorter time would be inadequate to bring our scheelite potentialities into production upon an efficient basis. The extension should permit continued normal gold production, so that the hardships referred to in our Appeal of October 15th would not materialize, and so that scheelite production, carried on at a loss, would be reasonably compensated for.

Under date of December 11, 1942, the WPB granted Alaska-Pacific an additional period of operation, its letter of authorization reading in material part as follows:

After careful consideration of the facts presented in your Appeal, the following relief from Order L–208 is hereby authorized:

> Permission is granted until June 8, 1943, to continue your normal lode mine operations of breaking, drawing and milling gold-bearing ore, for the purpose of producing tungsten-bearing ore and upon the condition that plans for proceeding with this operation shall meet with the approval of the War Production Board.

The provisions of Order L–208 are waived to the extent required to obtain the relief authorized above, provided that Order L–208 in all other respects and all other Orders and Regulations of the War Production Board are fully complied with.

128. Alaska-Pacific submitted certain additional reports and requests for relief in the succeeding months. In a report submitted under date of January 26, 1943, it stated that approximately 35 tons of scheelite ore had been produced in two full months, which "exceeded the 3% minimum of contained WO–3 prescribed by Metals Reserve Company."

129. Under date of April 14, 1943, the Director of the Mining Equipment Division of WPB wrote to Alaska-Pacific in part as follows:

> * * * Your report on the recovery and production of tungsten, and the information contained in the report by the United States Geological Survey, would indicate that it is neither desired or advisable, to attempt to continue your operations on any other basis than for the production of gold with tungsten as a by-product. The limited amount of tungsten that might be produced by hand-sorting of the ore is not impressive. Additional tungsten might be recovered by proper mill treatment of the ore, but the time involved in determining the method of recovery to be used in making installations in your plant, the manpower required in the operation of your mine and mill, the materials consumed, and the potential tungsten production, do not justify the continuation of your project.
>
> It is the opinion of all groups concerned, after a thorough review of your case, that neither your present production of tungsten or potential production under either of the proposed plans for recovery, justifies the continued operation of your gold mine.
>
> The production of a high iron sulphur concentrate as diluent, for use at the Tacoma Smelter, through the

mining and treating of an estimated 30,000 tons of ore annually, to produce 1,000 tons of concentrates, is not economical in the use of manpower or materials consumed. Every possible effort is being made to provide that type of flux from other than a gold mine. For these reasons, the issuance of a serial number under Order P–56 for your gold mine, has not been recommended.

The grant permitting continuation of your gold mining operations at the Independence Mine, Wasilla, Alaska, expires June 8, 1943. You are hereby advised that your mine and mill should be placed in standby condition by that date. This is in accordance with the policy of the War Production Board, established through the issuance of Limitation Order L–208, directing the closing of all nonessential mines in the United States. This policy has been extended to Latin America and other foreign countries, through the curtailment of supplies and materials being furnished for gold mining. The reduced consumption of materials, supplies and equipment, through the cessation of gold mining, transfer of idle equipment for use in production of strategic materials and defense projects, has been effective in stimulating production, accelerating completion of projects and reducing the load on the production lines, which are needed to produce for direct military requirements, as well as our vital industries.

130. Under date of May 12, 1943, Alaska-Pacific submitted to WPB a final and voluminous appeal, emphasizing the hardship to itself and its employees which would result from the close down of operations.

By telegram of June 6, 1943, the WPB allowed a further extension of operations to August 8, 1943. On June 21, 1943, the administrator of Order L–208 wrote to Alaska-Pacific advising that after August 8, 1943, the mine must be placed in standby condition.

131. On July 29, 1943, Alaska-Pacific sent the following letter to the WPB Mining Branch:

This is to advise you and the various members of the Board that on or before August 8th, 1943, our operations near Wasilla, Alaska, will be closed down pursuant to the above referred to Order and the various directions issued thereunder. This step is taken by us under the threat of the criminal and other penalties which are provided for in the order. It is not voluntary on our part, but under express protest.

We hereby advise you of such protest and that we reserve all of our legal rights against those responsible for the promulgation and enforcement of this order, it being the position of this company that the order itself and the various actions taken under it are without sufficient foundation in law and are illegal.

We are unable at this time to estimate the extent of the damage which we may sustain by virtue of the enforcement of this order. However, you are advised that it will amount to a substantial sum.

On August 13, 1943, the administrator of Order L–208 wrote the following letter to Alaska-Pacific:

Your letter of July 29 with reference to the closing of your Independence Mine at Wasilla, Alaska, has just been brought to my attention.

We regret that conditions necessitated the action which made the closing of your mine necessary, however, we feel that you are following the wisest course by ceasing operations at the expiration of the extension of the grant made to your company. Little hope of extension could be anticipated in view of present conditions in Alaska, with respect to coal shortage and the difficulty in securing men to work in those mines.

We trust that your company will encourage in every way possible the transfer of men released from your operations, to coal mines. That is one of the most important contributions that could be made to the war effort at this time.

132. The plaintiff received a formal notice dated August 13, 1943, from the WPB in the following terms:

This is with reference to your appeal filed under date of May 12, 1943, requesting relief from the provisions of Limitation Order L–208.

An extension of time was given you on the grant under which you had been operating, permitting you to continue your operations until August 8, 1943, under the same limitations and prohibitions as the original grant.

You ask that an exception be made in your case by the grant of permission to continue your lode mine operations in the Independence Mine located at Wasilla, Alaska, for the purpose of extracting gold in conjunction with your tungsten ore production.

The Appeals Board has given full and careful consideration to all of the facts brought out in your appeal and has consulted the War Manpower Commission as to the advisability of permitting your workers to con-

tinue in a non-essential mine. It is the War Manpower Commission's belief that your workers can be utilized to better advantage in the war effort in the coal mining operations in your immediate vicinity.

Therefore, we regret to inform you that your appeal for relief from Order L–208 must be denied.

133. There is no competent evidence in the record to show the employments to which former employees of Alaska-Pacific transferred upon the closing of the mine on August 8, 1943. On the whole, gold miners are unfavorably inclined toward employment in coal mines, partly because of the hazards involved and partly because equipment and machinery are different. Although the record does not establish the exact number of gold miners who transferred to the two coal mines, at least four, and possibly a few others, did. There were no other strategic metal mines in Alaska for the gold miners to transfer to.

134. Subsequent to the closure of the mine, Alaska-Pacific sold most of the perishable items in its inventory to such agencies as the Alaska Road Commission and the Alaska Railroad, and stored at the mine the other items.

135. Prior to the closure pursuant to L–208, Alaska-Pacific was operating its mining properties at a profit.

136. By reason of the issuance of L–208 Alaska-Pacific was deprived of the use and benefit of ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

137. No compensation has been paid to Alaska-Pacific by defendant for the closing of its mines as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF BALD MOUNTAIN MINING COMPANY

138. Bald Mountain Mining Company (hereinafter referred to as Bald Mountain) is a corporation incorporated under the laws of the State of South Dakota.

139. On October 8, 1942, Bald Mountain was the owner of certain gold-bearing lands in Lawrence County, South Dakota. On that date it was engaged in mining gold on said properties.

140. Subsequent to the issuance of Limitation Order L–208 by the War Production Board, Bald Mountain filed an appeal for relief from its provisions, and was granted permission to remove broken ore from the mine and to operate its mill up to June 1943. This firm continued operations on that basis to that date. The War Production Board granted permission to continue operations to August 8, 1943, but notification of this action was received by this plaintiff after it had already ceased operations.

141. Bald Mountain had approximately 150 employees shortly before October 8, 1942. The record does not disclose the nature of the employments to which these men shifted after the closing of the mine.

142. The record does not disclose the nature or size of Bald Mountain's inventory of mining equipment, materials and supplies as of October 8, 1942, or the length of time it could have continued to operate without replenishment of such inventory. The record does not disclose the extent, if any, to which this plaintiff may have sold or otherwise disposed of any of its mining equipment during the period its mine was shut down.

143. Bald Mountain reopened its mine shortly after the revocation on June 30, 1945 of Limitation Order L–208, and has remained in operation since.

144. By reason of the issuance of L–208 Bald Mountain was deprived of the use and benefit of its ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

145. No compensation has been paid to Bald Mountain by defendant for the closing of its mine as hereinbefore described.

FINDINGS RELATING TO PLAINTIFF ALABAMA-CALIFORNIA GOLD MINES COMPANY

146. Alabama-California Gold Mines Company (hereinafter referred to as Alabama-California) is a corporation organized under the laws of the State of Washington.

147. On October 8, 1942, Alabama-California was the owner of certain gold-bearing lands located in the State of California.

148. On August 8, 1942, Alabama-California closed its gold mine, and ceased all operations at the mine either that day or the next. This closing was the result of a shortage of manpower and materials, and the possibility that such a closing would be necessary had been contemplated by the Board of Directors for several months.

149. During the year 1943, Alabama-California sold $40,000 to $50,000 worth of supplies and materials from its mine. Additional sales were made thereafter, and in 1949 most of the balance of the machinery and equipment at the mine was sold.

150. Alabama-California has never reopened its gold mine since its closing in August of 1942.

FINDINGS RELATING TO PLAINTIFF CONSOLIDATED CHOLLAR GOULD & SAVAGE MINING COMPANY

151. Consolidated Chollar Gould & Savage Mining Company (hereinafter referred to as Consolidated Chollar) is a corporation organized under the laws of the State of California.

152. On October 8, 1942, Consolidated Chollar owner certain gold-bearing lands in Story County, Nevada.

153. On October 8, 1942, the above-named firm was operating a mine producing gold and silver on this property, the proportion of the two metals produced being about fifteen ounces of silver to one of gold. Its method of operation at that date was an open-pit one, that is to say, it had explored the location and size of the veins of gold and silver through an underground shaft, but finding the cost of mining through that shaft to be excessive, had stripped off the rock above the veins containing precious metal, and was recovering ore by use of power shovels. It had limited its operations exclusively to open-pit mining sometime prior to the middle of 1942 when the underground mining was discontinued.

154. Prior to the issuance of Order L–208, from about March 1942 until such issuance, it had been apparent to this plaintiff's officers that the pit operations of stripping off the surface rock, or overburden, preliminary to mining the gold and silver ore, were becoming prohibitively curtailed because of the shortage of rubber essential to the trucking of waste

from the stripping operations. For several months prior to October 30, 1942, in anticipation of that point when the development of new ore would no longer be practicable, Consolidated Chollar's management had been making preparations to conduct operations which would consist of the rehandling of previously mined and processed ore. Machinery was installed for this purpose.

The record does not show the extent of the open-pit operations which had been conducted by this firm.

155. On October 30, 1942, Consolidated Chollar requested of the WPB permission to conduct operations which would consist of the rehandling of previously mined and processed ore called tailings. It stated that the operations would require a crew of only six men and that they would be available from the local community and were of advanced age so they were precluded from employment in copper mines or defense plants. It also stated that the planned operations would require no steel consumption and that the supplies on hand and available from mines already closed down would enable the operations to be carried to completion.

On November 25, 1942, Consolidated Chollar was notified by the WPB that it was authorized to conduct the rehandling operations desired, and on February 26, 1943, this authority was extended to June 30, 1943.

156. Consolidated Chollar's operations involving the rehandling of previously processed ore turned out to be unsuccessful and resulted in financial loss. On April 28, 1943, it advised WPB of this and requested permission to resume its normal operations consisting of open-pit mining. It informed the WPB that a resumption of such operations had been impossible three to six months previously because of the lack of adequate equipment but that it then anticipated equipment would be available for a resumption of normal operation as a result of the completion of defense projects in the area of its operations.

Consolidated Chollar anticipated that its return to open-pit operations would require not to exceed 20 men from the locality whose ages averaged over 50 years. This plaintiff also anticipated that steel consumption in the open-pit operations would be extremely low and estimated that there were sufficient steel-contained materials on hand to last about six

months. Necessary operating supplies and fabricated repair parts were expected to amount to about $6,000 per month.

On June 19, 1943, the WPB refused to transfer the application of serial number 36–209, which had authorized Consolidated Chollar's rehandling operations, to the resumption of open-pit mining, and thereby refused it permission to resume open-pit operations.

157. On June 23, 1943, in furtherance of its attempts to obtain permission to conduct open-pit operations, Consolidated Chollar advised the WPB by letter that there were 15 men not suitable for work in war industries available in the locality and that there were sufficient operating supplies and fabricated repair parts on hand, with the exception of sodium cyanide, for the conduct of operations for six months. It stated in this letter that if such operations were authorized, priority assistance for supplies and equipment would not be required for six months except in the event of unexpected equipment breakdown.

158. On August 28, 1943, the WPB issued Serial No. 36–26–T under Preference Rating Order P–56 which had the result of removing Consolidated Chollar from the restrictions of Order L–208. It was permitted to conduct open-pit operations as a result of the issuance of this serial number. Also, it was authorized by the serial number the use of a priority rating under P–56 for the obtaining of maintenance, repair, and operating supplies. The rating was extended at least through the first and second quarters of 1944.

By letter dated December 10, 1943, Consolidated Chollar reported to the WPB in respect to its operations under the serial number for the previous ninety days, as follows:

> Owing to inefficiency of available labor and lack of adequate equipment in the form of power shovels and trucks for the pit operation we have as yet been unable to bring the operation up to capacity. As time goes on we hope this condition will improve.

The letter also stated that up to and including November 30, 1943, it employed 23 men and that the average daily tonnage of ore produced was 320 tons. These figures compared with the 1942 operations which resulted in a total

tonnage of 144,192 tons, or roughly 400 tons per day, with about 23 or 24 employees.

The record does not disclose how long this plaintiff continued operations under the aforementioned serial number or its reasons for discontinuing its operations, if it did.

159. After the war when Consolidated Chollar resumed operations, it conducted open-pit operations. At that time this plaintiff found it necessary to first remove overburden from above the ore vein because no ore was clear for breaking. The reason for this was that during the effective period of Order L–208, it had been able to process all of the ore which it had stripped of overburden prior to the close of 1942.

160. From the issuance of L–208 to August 28, 1943, Consolidated Chollar was permitted to carry on the rehandling of previously mined and processed ore in accordance with plans the company had made early in 1942. From August 28, 1943, to the end of the war, Consolidated was in possession of a serial number which permitted it to carry on open-pit mining operations and to use a priority rating under P–56 to obtain maintenance, repair and operating supplies. Consolidated Chollar was never required to close its mine under L–208.

FINDINGS RELATING TO PLAINTIFF ERMONT MINES, INC.

161. Ermont Mines, Inc. (hereinafter referred to as Ermont), is a corporation organized under the laws of the State of Oregon.

162. On October 8, 1942, Ermont was the owner of a compact block and contiguous Quartz Lode Mining Claim, designated Nos. 1 through 34 inclusive, located in Montana unorganized Mining District, County of Beaverhead, State of Montana.

163. In October 1942, Ermont was working claims numbered 1 (with drifts on claims numbered 2, 3 and 4), 2 (working over into claim No. 6), 7, 9, 19, 20, 23, 24, 28, and 32. After receiving WPB order to close down in October 1942, Ermont continued taking out the ore already mined during the latter part of October and into November, ran it through the mill and the refinery and shipped it to the mint.

Thereafter the mine and buildings were closed and a watchman was employed to look after the property.

164. On October 8, 1942, Ermont employed a crew of men, number not established, adequate to work the above claims. The men had their homes in the vicinity of the mine. The mine had sufficient supplies, machinery and equipment, in good working order to continue operations for at least a year from October 8, 1942, if the owner had not closed down in compliance with L–208. Mining operations were resumed at Ermont at some time subsequent to the revocation of L–208 in 1945.

174. By reason of the issuance of L–208 Ermont was deprived of the use and benefit of its ownership of its gold mining properties, i. e., the right to obtain gold from the ore bodies on its properties and to sell such gold.

175. No compensation has been paid to Ermont by defendant for the closing of its mine as hereinbefore described.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgments herein, the court concludes that as a matter of law plaintiffs Homestake Mining Company, No. 50195; Idaho Maryland Mines Corporation, No. 50182; Central Eureka Mining Company, No. 49468; Alaska-Pacific Consolidated Mining Company, No. 49693; Bald Mountain Mining Company, No. 50214, and Ermont Mines, Inc., No. 50214, are entitled to recover, the amounts to be determined in further proceedings under Rule 38 (c) before a commissioner of the court.

The court further concludes that as a matter of law plaintiffs Oro Fino Consolidated Mines, Inc., No. 49486; Alabama-California Gold Mines Co., No. 50214, and Consolidated Chollar Gould & Savage Mining Company, No. 50214, are not entitled to recover and their petitions are therefore dismissed.

In the United States Court of Claims

(Decided July 12, 1956)

No. 49468

CENTRAL EUREKA MINING COMPANY (A CORPORATION)

v.

THE UNITED STATES

No. 49693

ALASKA-PACIFIC CONSOLIDATED MINING COMPANY

v.

THE UNITED STATES

No. 50182

IDAHO MARYLAND MINES CORPORATION

v.

THE UNITED STATES

No. 50195

HOMESTAKE MINING COMPANY

v.

THE UNITED STATES

No. 50214

(1) BALD MOUNTAIN MINING COMPANY,
(7) ERMONT MINES, INC.

v.

THE UNITED STATES

Mr. Phillip Barnett for Plaintiff Central Eureka Mining Company. *Messrs. Ralph D. Pittman* and *Rodney H. Robertson* were on the brief.

Mr. John Ward Cutler for Plaintiffs, Bald Mountain Mining Company, and Ermont Mines, Inc.

Mr. O. R. McGuire, Jr., for Plaintiff Alaska-Pacific Consolidated Mining Company. *Messrs. Hogan & Hartson* and *V. A. Montgomery* were on the brief.

Mr. George Herrington for Plaintiff Idaho Maryland Mines Corporation. *Messrs. Orrick, Dahlquist, Herrington & Sutcliffe* were on the briefs.

Mr. Edward W. Bourne for Plaintiff Homestake Mining Company. *Messrs. James D. Ewing, Eugene Z. Du Bose, Edward E. Rigney, J. Kenneth Campbell* and *James W. Misslbeck* were on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General Warren E. Burger*, for the defendant.

ON DEFENDANT'S MOTION FOR NEW TRIAL

LITTLETON, *Judge*, delivered the opinion of the court:

In support of its motion for a rehearing in the above cases, the Government says that the court erred in holding that the issuance of War Production Board Limitation Order L-208 amounted to an exercise of the Government's wartime power of requisitioning or eminent domain because (1) in issuing L-208 the Government did not expressly intend or purport to exercise such requisitioning powers and (2) if L-208 was an "invalid" order, as defendant insists the court held it was, it conferred no right on the plaintiffs to just compensation. On the whole record the court is of the opinion that defendant's motion should be denied.

Defendant attempts to create the impression that this court held that the War Production Board purported to act under a single act, i. e., the Act of October 16, 1941, 55 Stat. 742, containing certain requisitioning powers, when it issued L-208, whereas, defendant says, the record in these cases will not support such a conclusion.

The court did not hold that WPB purported or intended to exercise any of its several requisitioning powers when it issued L-208. The court noted the various authorities actually cited at the conclusion of L-208 including Executive Order 9024 which contained a delegation of the President's requisitioning authority conferred by section 120 of the National Defense Act of 1916 (39 Stat. 312). Beyond that, the court merely noted the various statutes in effect on the date of the issuance of L-208 which gave the Government wide powers to take private property needed by the Government to carry on the defense of the country in wartime, and held that under such a statutory scheme the Government appeared to have had adequate power to take what it in fact took from the plaintiff gold mine owners and operators.

On the matter of whether WPB "intended" or "purported" to act under any of the statutes giving the Government the power to take or requisition private property for war purposes, the court held that WPB purported to issue a priorities and allocation regulation; that to the extent that L-208 prevented the gold mine owners and operators from acquiring new equipment, material and facilities, L-208 was a proper priorities and allocation order, but that to the extent that L-208 denied those owners the right and clear authority which they and every other citizen have to make use of the materials, facilities and equipment which they owned and had on hand, in the operation of their legitimate and legal mining enterprises, L-208 had the effect of completely depriving them of a valuable property right. The court then held that because the Government had the authority to exercise the power of eminent domain and thus to deprive the gold mine owners of that property right, the Government must pay just compensation therefor whether this was done by the WPB in one form or another.

The court did not hold, as counsel for the defendant says it did, that L-208 was an invalid order. The court held that to the extent that L-208 actually allocated scarce materials away from the gold mine owners and operators it was a valid allocation order but that to the extent that it deprived the gold mine owners of the right to use their mining properties by "immobilizing" the materials, equipment and facilities owned by them and which they had on hand and needed to use to operate their mines, the order amounted to a temporary taking of their right and authority to profitably operate their mines.

The court expressly stated that an unauthorized taking is not compensable. It also stated that where there exists authority for a taking of a type of property and the Government, as it did here, takes that property, the use by the Government of a means of acquiring that property, which means was not specifically spelled out by some specific statute, does not relieve the Government of the obligation of paying just compensation, citing, among others, the case of *Edward P. Stahel & Co., Inc., et al.* v. *United States*, 111 C. Cls. 682, cert. den. 336 U. S. 951. Where there is authority to take and a taking is accomplished it is compensable. In the *Stahel* silk cases the Government had the statutory authority to take the plaintiffs' silk; the Government did not "purport" to exercise that power but rather it purported to exercise a regulatory power by issuing Order M-251 freezing or immobilizing the silk in the hands of the owners themselves until the Government should place mandatory orders requisitioning the silk. This freezing order was held to be a taking and, because the Government had the necessary power and statutory authority to "take" the silk, the court held that it must pay just compensation for it and it did so.

Defendant next attempts to analyze some of the requi-

sitioning statutes noted by the court, in order to indicate that WPB did not in fact invoke any of those statutes when it issued L-208. This court did not hold that WPB invoked those statutes any more than it held that the Government invoked the requisitioning statutes available to it in the *Stahel* silk cases. In fact, this court noted that WPB issued L-208 with the express (see preamble to the order) intention of exercising only its priority and allocation powers. The court held that what WPB said it was doing and what it in fact and law did, were two different things and that the Government could not escape the obligation of paying just compensation for what it had the authority to take and in fact took, simply by calling its action of taking a "priorities order" or an "allocation order."

Defendant's counsel also says that the expression used by the court, "war necessity," does not appear in the "taking statute" of October 16, 1941, *supra*. In using that expression the court was merely paraphrasing, as it had a right to do, the statutory language concerning the basis for the President's determination that the property proposed to be taken was necessary to the prosecution of the war; that the property was needed for the defense of the United States; that the need was immediate and impending and that all other means of getting the property had been exhausted. Inasmuch as that statute and other requisitioning statutes then in existence required no particular procedure to be followed in the making of those determinations and provided no appeals therefrom, the court held such determinations were within the discretion of the President or his delegees.

The main complaint of defendant's counsel seems to be that this court held that the Government had the necessary authority to take plaintiffs' property whereas the question of "authority" was not exhaustively briefed by the parties to the court.

It should be noted that this is the *first* occasion in this lengthy litigation on which the Government has taken the position that it lacked authority to take plaintiffs' property. No such contention has heretofore been made. Up to this point, defendant has contended that it did not take the property but merely "regulated" it. It would seem that as a defense "lack of authority to take", if there was any such lack of authority, which we think there was not, should have been raised and supported at an earlier stage. However, both parties may have felt that authority to take this property in wartime was perfectly clear, or they may have felt the point was decided in the court's decision in *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, in which the court held that if the Government took anything from the gold mine owners when it issued L-208, "it cannot escape liability by pleading that it lacked authority to take what it did in fact take and retain," citing *International Paper Co.* v. *United States,* 282 U. S. 399. The court in the *Oro Fino* case even went so far as to say that if L-208 resulted in an *unauthorized* taking, "it was a taking of which the Government retained the benefit and for which it would therefore be obligated to pay."

In the *Central Eureka* opinion, the court did not go as far as suggested in the *Oro Fino* decision because the court found that the existing statutory scheme at the time of the issuance of L-208 contained sufficient authority to cover the taking complained of and thus avoided that twilight area involving the right to just compensation where authority to take the property involved is not clear. On that point, in the recent decision of the Supreme Court in *Bill Hatahley et al.* v. *United States,* No. 231, decided May 7, 1956, the Court stated:

> * * * The fact that the agents [of the Government] did not have actual authority for the pro-

> cedure they employed does not affect liability. There is an area, albeit a narrow one, in which a government agent, like a private agent, can act beyond his actual authority and yet within the scope of his employment. * * *

The point involved in the *Central Eureka* opinion was not the lack of authority to take, but rather the use by the Government of an *unauthorized means* of accomplishing an *authorized* taking. The court held that the use of an unauthorized means of taking what the Government had the authority to take, did not relieve the Government of the obligation to pay just compensation for what it took, citing *Edward P. Stahel, supra,* (silk cases), and *Hurley* v. *Kincaid,* 285 U. S. 95, (in which the Government took by *flooding* what the statute said it must take by *condemnation proceedings*).

The final position of defendant's counsel seems to be that the only cases in which the Government may be required to pay just compensation for property which it is authorized to take and does take, are those cases in which the Government has expressly invoked a particular taking or requisitioning statute, has used the precise means of taking provided for in that statute, and has then refused to pay for what it has taken. This theory, if adopted, would rule out many taking cases among which are cases such as the silk cases, the set-aside order cases, the flooding cases, the Causby chicken farm case, and, in fact, most of the "taking" cases.

In these cases the court held simply that what the War Production Board did through the issuance of L-208 amounted to and constituted a taking through the placing of a servitude upon the use by plaintiffs of their property and plaintiffs were accordingly held entitled to recover. From this it seems clear, under the decisions, that there was a temporary taking under the Fifth Amendment. The court did not hold that there

was anything illegal about the issuance of L-208 so far as its provisions were concerned. It merely held that when a Government agency has the power to take private property, as the War Production Board did, it does not have to act in some particular formal way in order that its action shall amount to a taking.

In view of the fact that defendant's allegations of error are based on a demonstrably mistaken understanding of the court's opinion and upon conclusions clearly not warranted by that opinion, inasmuch as the court did not hold that L-208 was an invalid order and did not hold that the War Production Board purported to act under or invoke the requisitioning powers contained in any particular statute, defendant's motion for a new trial is overruled.

MADDEN, *Judge*, and WHITAKER, *Judge*, concur.

LARAMORE, *Judge*, and JONES, *Chief Judge*, dissent.

SUPREME COURT OF THE UNITED STATES

No. 1, October Term, 1956

THE UNITED STATES, PETITIONER

vs.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 24th, 1956.

(S.) EARL WARREN,
Chief Justice of the United States.

Dated this 9th day of October, 1956.

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BRIEF FOR THE UNITED STATES

No. 29

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE UNITED STATES, PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 29

THE UNITED STATES; PETITIONER

v.

CENTRAL EUREKA MINING COMPANY (A CORPORATION), ALASKA-PACIFIC CONSOLIDATED MINING COMPANY, IDAHO MARYLAND MINES CORPORATION, HOMESTAKE MINING COMPANY, BALD MOUNTAIN MINING COMPANY, ERMONT MINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinions of the Court of Claims (R. 11–62) are reported at 134 C. Cls. 1 and 138 F. Supp. 281. The opinion denying the Government's motion for a new trial (R. 142–147) is reported at 134 C. Cls. 130 and 146 F. Supp. 476.[1]

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[1] Related opinions of the Court of Claims, on the Government's demurrer to the petitions, are as follows: *Oro Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, certiorari denied, 341 U. S. 948; *Alaska-Pacific Consolidated Mining Co.* v. *United States*, 120 C. Cls. 307; *Idaho Maryland*

JURISDICTION

The judgment of the Court of Claims was entered on February 20, 1956 (R. 58). A motion by the United States for a new trial, seasonably filed, was denied July 12, 1956 (R. 147). By order of the Chief Justice, dated October 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including October 24, 1956. The petition for a writ of certiorari was filed on October 24, 1956 and was granted on January 14, 1957. 352 U. S. 964. The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTION PRESENTED

In order to conserve scarce war materials, to divert mining machinery and equipment to essential wartime enterprises, and to bring about the voluntary relocation of manpower to vital mining activities and essential war work, the War Production Board on October 8, 1942, issued Limitation Order L–208. This order, as amended, required gold mines deemed nonessential to this country's war effort to be closed in the shortest possible time; prohibited operators of nonessential gold mines from acquiring or using any material, facility or equipment for mining purposes except the minimum amounts necessary for adequate maintenance; and prohibited the sale or disposition of mining machinery and equipment without the permission of the War Production Board. Without reference to the requirement as to the closing of the gold mines,

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Mines Corp. v. *United States*, 122 C. Cls. 670; *Homestake Mining Co.* v. *United States*, 122 C. Cls. 690; and *Central Eureka Mining Co.* v. *United States*, 122 C. Cls. 691.

the other restrictions had the inevitable effect of precluding the further mining of gold by the corporations affected. The Government did not otherwise interfere with respondents' exclusive possession and control of the mines.

The question is whether Limitation Order L–208 should be deemed a temporary restriction upon the use and enjoyment of private property in the interest of the national defense, or an authorized temporary taking of private property for public use under the Fifth Amendment.

STATUTES AND REGULATIONS INVOLVED

1. Section 301 of the Second War Powers Act, 56 Stat. 176, 177 amending Section 2 (a) (2) of the Act of June 28, 1940, 54 Stat. 676 (50 U. S. C. App. (1946 ed.) 633) provides, in material part, as follows:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

2. The Act of July 14, 1952, 66 Stat. 605, provides as follows:

> That the United States Court of Claims be, and hereby is, given jurisdiction to hear, determine, and render judgment, notwithstanding any statute of limitations, laches, or lapse of time, on the claim of any owner or operator of a

gold mine or gold placer operation for losses incurred allegedly because of the closing or curtailment or prevention of operations of such mine or placer operation as a result of the restrictions imposed by War Production Board Limitation Order L–208 during the effective life thereof: *Provided,* That actions on such claims shall be brought within one year from the date this Act becomes effective.

3. Orders and Regulations of the War Production Board, so far as pertinent, are set out in Appendix B, *infra,* pp. 111–125.

STATEMENT

Respondents are owners and operators of gold mining properties who at varying points of time in the course of World War II suspended gold mining operations pursuant to War Production Board Limitation Order L–208. By these actions, consolidated by the Court of Claims for trial on the issue of liability, each respondent seeks compensation under the Fifth Amendment for the alleged temporary "taking" of its mines or rights therein[2] effected by Limitation Order L–208. The Court of Claims (R. 11–58), two judges dissenting (R. 58–62), held that L–208 amounted to a temporary taking of the profitable use of mining property for which the United States was,

[2] Each respondent is, in whole or in part, the owner of mining property affected by L–208. Alaska-Pacific, in addition to outright ownership of mine properties, holds mining rights in two groups of claims, one by virtue of a lease and royalty agreement coupled with a purchase option expiring in 1961, and the others held by virtue of location notices.

under the Fifth Amendment, obliged to pay just compensation.[3]

In Appendix A (*infra*, pp. 73–110), we set out in detail the somewhat lengthy history and background of Limitation Order L–208. A brief summary of this history and background follows:

1. *Regulations Adversely Affecting the Gold Industry Prior to Limitation Order L–208.*—As early as May 1941, requirements for strategic and critical metals and the machinery to produce these metals began to outdistance supply and productive capacity. In recognition of the importance of the mining machinery and equipment industry to the defense preparedness requirements of the United States and the lend lease requirements of the Allies, the Office of Production Management (OPM), predecessor of the War Production Board (WPB), on July 29, 1941, issued its Preference Rating Order P–23. This order permitted producers of mining machinery and equipment to use a priority rating of A–3 in acquiring materials to be used in the production of mining machinery and equipment.[4]

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[3] While sustaining the claims of the present respondents, the Court of Claims at the same time dismissed, on independent grounds, the complaints of Oro Fino Consolidated Mines, Inc., Alabama-California Gold Mining Co., and Consolidated Chollar Gould & Savage Mining Co. (R. 141). Approximately 150 claims predicated upon Limitation Order L–208 remain pending in the Court of Claims.

[4] Priority ratings assigned to various industries by OPM, and subsequently by WPB, ranged from A–1 to A–10, with further breakdowns in the forms of A–1–a, A–1–b, A–1–c, etc.

Further, to assure the continuous operation of the nation's mining industry, OPM recognized the industry's need not only for new equipment but also for maintenance and repair equipment. On September 17, 1941, OPM issued Preference Rating Order P–56 (R. 1255). Under this order, which applied to approximately 15,000 mines, a mine operator whose operations were "important from the standpoint of defense or essential civilian needs" (R. 1167) was granted a serial number and could then apply for a priority rating entitling him to priority in the delivery of mine supplies and maintenance and repair parts.

Gold placer operations were expressly excepted from the priority benefits of P–56 (R. 1256), thus marking the first instance in which gold mining operations were singled out for special governmental treatment. In the fall of 1941, the shortage of critical mining material and supplies became increasingly acute. Since the gold mining industry was competing with essential nonferrous metal mines for the available machinery, equipment and material, the need for an overall governmental policy with respect to gold production was recognized. After obtaining the views and recommendations of various departments of the Government (R. 69–71), the Supplies, Priorities and Allocation Board adopted the policy with respect to domestic gold mining that "materials should not be allowed for expansion of production although minimum amounts for maintenance and repair may be provided" (R. 72). On December 18, 1941, OPM issued Preference Rating Order P–100

under which gold mines were entitled to the lowest priority, an A–10 priority rating, in acquiring maintenance, repair and operating supplies (R. 1369).

On December 31, 1941, P–56–a was issued, superseding P–23 and continuing the A–3 priority rating for manufacturers of mining machinery and equipment (R. 1260). On March 2, 1942, the War Production Board, successor to OPM, amended P–56 by uprating the priorities on mining machinery for essential mines and denying priority ratings to all mines whose production in dollar value consisted of 30 percent or more of gold and/or silver (R. 1268). Though the 30 percent exclusion clause was eliminated from P–56 on May 15, 1942 (R. 74), WPB in practice denied priority ratings to over 200 mines, including respondents' mines, not producing substantial quantities of materials critical to the war effort or to the civilian economy (R. 74–75).

Thus, as of March 2, 1942, by a series of OPM and WPB orders, respondents were operating, under the then scheme of wartime industry regulation, as one of the least essential industries. They were precluded from obtaining critical materials which might be needed in the operation of a mine producing material essential to the war effort and, while it was possible for gold mines excluded from the priority benefits of P–56 to apply for equipment, repair parts and operating supplies under Preference Rating Order, P–100 (the general repair order), with the very low A–10 priority rating, the wartime demands for such material so far exceeded supply that the possibility of gold mines obtaining material was remote (R. 75).

2. *Issuance of Limitation Order L–208.*—As of the spring of 1942, the progressively stringent restrictions upon the gold mining industry were deemed necessary because of the inadequate production, and increasingly acute shortage, of nonferrous metals—copper, lead, zinc, etc. (R. 74–75); a shortage of mining equipment and machinery—new and used (R. 73–74); and a shortage of equipment and materials used to manufacture mining equipment and machinery (R. 73–74). The gold industry was singled out for particularly restrictive treatment because gold was not of importance to the war effort, yet its production consumed material in short supply, badly needed by essential nonferrous metal mines (R. 69).

In the summer of 1942, an additional factor became apparent that was to precipitate the more drastic restriction of the gold industry in the form of Order L–208, in October 1942. In July, August, and September, 1942, the shortage of labor in nonferrous metal mines reached such a point that inadequate production of essential metals became a threat to the entire armaments program (R. 75–76). When the concerted efforts of the WPB, the War Manpower Commission, the United States Employment Service and the Army and Navy (R. 76–77) failed appreciably to alleviate this labor shortage, the attention of WPB and other agencies of government turned to the gold mining industry since, in the words of the Chief of the Mining Branch, WPB, "[t]he gold and silver miners constitute the last reservoir of the skilled mining labor" (R. 79, 492–493). Upon the expectation that a sizable number of the laborers re-

leased by a further restriction of the gold industry would be diverted to the nonferrous metal mines as well as other essential industries (R. 86–87, 92), the WPB on October 6 agreed that an order should be issued suspending all nonessential gold mining operations within 60 days (R. 101).

On October 8, 1942, the WPB issued its Limitation Order L–208. Addressed exclusively to the gold mining industry, L–208, as originally promulgated, directed each operator of a nonessential mine[5] immediately to take steps to close down operations and, after seven days, not to acquire, consume or use any material, facility or equipment to break new ore or to proceed with development work or any new operations in or about the mine. The order further directed that, after sixty days, material, facilities, or equipment should not be acquired, consumed, or used to remove ore or waste from the mine or to conduct operations in or about the mine except to the minimum amount necessary to maintain buildings, machinery and equipment in repair and to keep access and development workings safe and accessible. Preference ratings were not to be applied to acquire any equipment or material for consumption or use in the

[5] Specifically, the order applied to all gold mine operators not holding serial numbers under Preference Rating Order P–56. P–56, as of October 8, 1942, was addressed to the mining industry generally and provided for the assignment of serial numbers to mines whose production included significant quantities of material important to national defense (R. 102). Gold mines, including respondents' mines, not producing substantial quantities of critical materials, were, as noted above, denied P–56 serial numbers.

operation, maintenance or repair of a nonessential mine except with the express permission of the Director General of Operations, WPB, after application made to the Mining Branch, WPB. Lode mines which produced 1,200 tons or less ore and placer mines which treated less than 1,000 cubic yards of material in 1941, were, with limitations, excepted from the operation of the order. Provision was made for appeal to the WPB by any person affected by the order who considered that compliance would work an exceptional and unreasonable hardship (R. 104).

On November 19, 1942, L–208 was amended (R. 1574 C–D, 7 Fed. Reg. 9613, App., B, *infra*, pp. 114–115) to prohibit the sale or other disposition, or acceptance of delivery, of any mining machinery or equipment of the type listed in Schedule A to Preference Rating Order P–56 (R. 1276–1277), except with the express permission of the Director General of Operations, WBP, and each operator was required to submit to WPB an itemized list of Schedule A equipment and machinery indicating each item available for sale or rental.

On August 31, 1943,[6] L–208 was further amended (8 Fed. Reg. 12007, App., B, *infra*, pp. 118–123) by adding a Schedule A listing 74 items of mining equipment and machinery (App., B, *infra*, pp. 123–125) and prohibiting the sale, transfer or disposition of this equipment and machinery except (1) with the express permission of WPB or (2) to a producer holding a

[6] The amendment to L–208 of November 25, 1942 (7 Fed. Reg. 9810) merely changed the time within which the inventory of equipment and machinery was to be submitted to WPB.

serial number under Preference Rating Orders P–56, P–58, P–73.[7] As thus amended, L–208 further required that after August 31, 1943, the sale or transfer of equipment and machinery to holders of P–56, P–58, or P–73 serial numbers was to be immediately reported to the WPB mining division.

L–208, as amended, remained in effect until revoked by WPB on June 30, 1945 (10 Fed. Reg. 8110).

While a dominant consideration underlying its issuance was the release and expected diversion of labor from the gold mines to nonferrous metal mines (*supra,* pp. 8–9), L–208, as issued, was by its terms designed to conserve the critical material and equipment normally consumed in gold mining operations, and, as amended, to allocate to essential enterprises the substantial reservoir of mining equipment and machinery rendered idle by the suspension of gold mining operations. None of the respondents, by legal proceeding, questioned the validity of L–208 or the authority of WPB to issue the order.

3. *The Closing of Respondents' Mines.*—Respondent Homestake Mining Company discontinued breaking new ore on October 15, 1942. On November 25, 1942, the WPB, on Homestake's appeal, denied permission to break any new ore or to proceed with development work or new operations but authorized, for a period of six months commencing December 8, 1942, the removal of broken ore from underground and the re-

[7] Preference Rating Order P–58 applied to South American copper mines and P–73 (8 Fed. Reg. 3667) applied to smelters and refiners of thirteen critical metals.

filling of stopes with suitable material. After June 1, 1943, the Homestake mine was closed down for all purposes except necessary maintenance. Operations were resumed on July 1, 1945 (R. 111–116).

On October 8, 1942, respondent Central Eureka Mining Company employed 117 men. Immediately following the issuance of L–208 all but 64 employees left the mine. The balance were retained by the Company to maintain the mine until January 1943, when the National War Labor Board ordered that no more than 42 employees be permitted to maintain the mine. Central Eureka resumed operations in 1947 or 1948 (R. 116–120).

Respondent Idaho Maryland Mine Corporation completely closed down the operation of its gold mining properties on October 15, 1942. However, in the period between December, 1941 and October 8, 1942, the Idaho Maryland payroll had been reduced from 800 employees to 212 and only curtailed operations were being conducted at the time L–208 was issued. On May 3, 1944, after appeal to WPB, Idaho Maryland was permited to resume operations on a limited basis (R. 120–124).

Respondent Alaska-Pacific Consolidated Mining Company closed its mines on August 8, 1943 (R. 134);[8] respondent Bald Mountain Mining Company, with permission of WPB, removed broken ore from the mine and operated its mill up to June, 1943, when mining operations ceased. Operations were resumed shortly after June 30, 1945 (R. 135–136).

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[8] The court made no finding as to the date Alaska-Pacific resumed gold mining operations.

Ermont Mines, Inc. removed broken ore during October and into November, 1942, ran it through the mill and the refinery, and shipped it to the mint. Thereafter, the mine and buildings were closed and a watchman employed to look after the properties. Mining operations were resumed sometime subsequent to June 30, 1945 (R. 140).

4. *The Decision of the Court of Claims.*—In holding that L–208 amounted to a temporary compensable taking of the profitable use of respondents' mining properties, the Court of Claims acknowledged that a nonessential industry such as the gold industry could be strictly regulated in wartime and that losses resulting from such regulation are not ordinarily compensable (R. 43). Order No. L–208, however, in the court's opinion, exceeded the permissible bounds of regulation because, as an order allocating machinery, equipment and material, no provision was made whereby the machinery, equipment and material made idle by the order would be held for the use of the Government or some essential user designated by the Government (R. 31–32); nor, the court said, did L–208 require that the owners deliver material to essential users but rather "left them free to dispose of the critical materials in any way or to anyone they pleased" (R. 40). "The [respondents] might have sold their inventories of machinery, supplies and equipment to any user whether or not that user was conducting a business which was essential to the defense effort" (R. 27). In the court's view, the respondents' loss of their right to mine gold was not a

consequential loss because "L–208 neither allocated nor took [respondents'] inventory and supply of critical materials, equipment and facilities" (R. 31) but was, instead, an authorized (R. 41–42) taking of the profitable use of their mining properties (R. 45).[9]

Chief Judge Jones dissented (R. 58–61) on the ground that the provisions of L–208 which forbade the use and acquisition of critical materials in gold mining operations were valid wartime allocations of critical materials, that the closing of the mines was incident to such allocations, and the closings thus within the court's ruling in *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815. Judge Larramore's dissent (R. 61–62) was grounded on the premise that L–208 was not an allocation order; that the closing of the mines was unauthorized, therefore not compensable and should have been enjoined.

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[9] The Court of Claims in effect reasoned, *not* that L–208 went too far in the exercise of the nation's wartime powers, but that it did not go far enough, because the order did not explicitly require that the machinery, equipment, and material of the affected mines be held for the use of the Government or essential users designated by the Government. The decision implies that, if L–208 had contained such a provision, the resulting losses would not be compensable. In this connection, it is appropriate to note that, although the record discloses references to the November 19 amendment to L–208 (R. 479–482; 1574C–D, 1575), neither the findings of the Court of Claims nor its opinions make any reference to the November 19 and 25, 1942 and August 31, 1943 amendments to L–208 (*infra*, pp. 111–125). See the discussion, *infra*, pp. 50–52.

SUMMARY OF ARGUMENT

In World War II, the task of converting the economy of the United States from a peace to a war basis, and the task of mobilizing and directing the economy to meet the exigencies of total war fell primarily to the War Production Board (WPB). To discharge its responsibilities, the WPB, by delegation from the President, was armed with (among other things) the statutory war power of the President to allocate material and facilities "in such manner, upon such conditions and to such extent" as "necessary or appropriate in the public interest and to promote the national defense." Section 301 of the Second War Powers Act, *supra*, p. 3. Under these powers, WPB regulated the nation's economy on an unprecedented scale with the objective that all of our resources be utilized with maximum efficiency to produce the munitions and implements necessary to the successful prosecution of the war.

Regulation by the War Production Board assumed a variety of forms but it was primarily through thousands of priorities orders, material conservation orders, and orders limiting, curtailing, or prohibiting production of nonessential products, or prohibiting and restricting the use of critical war materials, that industry was converted to, and mobilized for, war production. Through WPB regulation, raw materials, machine tools, machinery and equipment were channeled from nonessential users to enterprises essential to the war effort and manpower was made

available to the mines, factories, shipyards, aircraft plants, and other industries engaged in production vital to the war economy.

Limitation Order L–208, involved in this case, was but one instance of WPB's wartime regulation of American industry. By this order, WPB dealt with the problems of the mining industry which, in the fall of 1942, were so acute that the inadequate production of nonferrous metals—copper, lead, zinc, tungsten, etc.—posed a grave threat to the war program. L–208 directed gold mines not producing substantial quantities of critical materials to close down, and the order also prohibited, within certain time limits, the acquisition or use of any material, facility, or equipment for mining purposes except for restricted uses. By WPB Priorities Regulation 13 and Order L–208, as amended on November 19, 1942, the material, machinery, and equipment thus rendered idle were subject to being channelized to essential users and only to them. Order L–208 was issued because WPB reasonably believed (on the basis of repeated and careful studies, and after other expedients had been tried and had failed) that it was necessary to forbid the operation of nonessential gold-mining so as to channel and force mining equipment, material, and personnel into nonferrous mining which was then vital to the developing war effort.

I

In these circumstances, Order L–208 was a valid wartime regulation under the Executive's power of allocation of the nation's resources, and did not con-

stitute a taking of private property for public use compensable under the Fifth Amendment. While as a result of its restrictions the owners of mines suffered financial loss, a similar hardship was sustained by their employees and the mining communities dependent, in whole or in part, upon the operation of the mines. It does not follow, however, that the losses sustained by operators of mines who, by reason of L–208, were required until June 30, 1945, to suspend gold mining operations, are constitutionally compensable.

A. 1. The necessary elements of all constitutional takings are (1) an authorized intention on the part of the Government officials to take a recognized property interest from the owner and transfer it to the United States (as in the normal condemnation or requisition case), *or* (2) in the absence of such intent, an invasion into the possession of private property, of such character and magnitude that it cannot be accomplished without compensation under the Government's regulatory and non-eminent domain powers (as in the flooding cases). An actual invasion of property by the United States is required, as is *use by the Government.* We show in Point II that WPB had no intention or authority to take respondents' property; in this Point I, we show that Order L–208 did not result in an unintended taking.

2. In time of war, when national survival is at issue, the government's demands upon its citizens become most exacting; property rights cease to be inviolate, liberty is subject to restriction, and life itself is subject to sacrifice. Economic hardship, loss

of profits, inconvenience, and personal sacrifice, though far removed from the field of battle, are concomitants of present day warfare, as this Court has repeatedly recognized in the past. Most recently, the Court has held that the Fifth Amendment is "no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war." *United States* v. *Caltex,* 344 U. S. 149, 155. And the Court has held that restrictions placed upon the use and disposition of private property, in time of war and in the interest of national defense, impose no obligation upon the United States to compensate for losses or hardship which inevitably follow such restrictions. For example, within this sound rule fell the adverse economic consequences of wartime price and rent control restrictions imposed by the federal government in World War II.

3. In the same category are the losses and the economic hardships attributable to the allocation of material and facilities by the WPB pursuant to the Second War Powers Act. Such orders have been upheld as valid wartime regulations. And the Court of Claims has, prior to the present cases, correctly held that the exercise of this power to allocate material and facilities is not a "taking" of private property and gives rise to no constitutional claim to compensation for losses attributable thereto. *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815; *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U. S. 948.

A rigid constitutional doctrine which would require the United States to assume such indirect costs of war could well result in a prohibitive financial burden. The claims arising out of L–208 alone are estimated to exceed forty million dollars. And the gold mining industry is but one of any number of other industries and businesses which sustained severe economic hardship in consequence of WPB orders and regulations curtailing or stopping production of nonessential products or prohibiting or restricting the use, acquisition, and disposition of personal property.[10] Congress, of course, may as a matter of grace award compensation for such losses. To hold, however, that an industry is entitled to such compensation as a matter of constitutional right, is to impose a serious limitation upon the war power of the federal government.

B. 1. Limitation Order L–208 deprived respondents of no gold. The United States did not seize, condemn or take respondents' gold and as much gold remained for extraction when the restrictions of L–208 were lifted as when they were imposed. The United States made no public use of respondents' property; neither did the Government seize or occupy any part of the realty nor dispossess respondents of

[10] In the spring of 1942, WPB predicted that, as a result of its orders, about 25,000 manufacturing establishments would be compelled to shut down and it was estimated about 80,000 establishments would not be needed in war production. From 1942 through 1944, about 200,000 business concerns went out of existence; and since only a small percentage of these were "business failures," it is plain that World War II had a widespread and substantial adverse economic impact upon American business.

title or possession. Similarly, the United States did not requisition or take any material or equipment of the mines nor otherwise disturb respondents' title to or possession of personal property. Order L–208 merely required the temporary suspension of mining operations by respondents during the period of the war emergency in the interest of the nation's defense and should have been treated by the court below in the same way as other allocation orders—as valid wartime regulation. The legal right claimed to be invaded is the right to mine gold for private profit during the wartime emergency, regardless of the exigencies of the nation's safety, immune from governmental regulation of the character involved unless accompanied by legal liability of the Government. But such a claim clearly does not stand upon any different constitutional footing than other hardships and losses sustained by individuals and businesses in World War II.

2. The decision of the Court of Claims that L–208 results in a "taking" rests largely upon the mistaken belief that L–208 placed no restriction upon the disposition of idle material and equipment by operators of nonessential mines subject to L–208. WPB Priorities Regulation No. 13 (7 Fed. Reg. 5167) was in effect throughout the period L–208 was operative and restricted the sale of "war material" idled by action of the WPB. Moreover, by L–208, as amended on November 19, 1942 (App. B, infra, pp. 114–118), operators of L–208 mines were required to submit to WPB inventories of machinery and equipment indicating which, if any, was available for sale or rental.

The sale or disposition of such material was therafter prohibited except with the express permission of WPB. These provisions show the error in the court's conclusion that there were deficiencies in L–208 depriving it of its allocation and regulatory character.

3. The uncalled-for expressions by the Court of Claims that Order L–208 was unnecessary, unjustified and unsuccessful are equally unsound. While it is doubtful that the courts may properly inquire into the motivation underlying otherwise valid executive action, there can be no serious question that L–208 was both necessary and justified. L–208 was issued upon the unanimous recommendation of the War Production Board, with the approval and at the urging of the War Department, and was approved by the President. While recognizing that hardships would result, the WPB, the War Department, and the President were satisfied that L–208 was essential to the defense effort. Their judgment was, of course, without the aid of hindsight but was based upon a knowledge of the strategic and logistical problems of a world at war which a court record, fifteen years later, cannot possible reflect. The exigencies of the world situation in 1942 are matters of public knowledge, well known to this Court. The necessity for L–208 is traceable to these exigencies and its justification lies in the critical production problems which plagued the nonferrous metal mines in 1942 and which posed a threat to the entire war production program.

Similarly, the court's conclusion that L–208 was not devised nor intended as an allocation order is belied

not only by the terms of the order but by its accomplishments. Apart from its preamble, L–208, by its terms, prohibited the acquisition of materials essential to maintenance and operation of gold mines. And L–208 prohibited the consumption of material, facilities, and equipment by nonessential mines. By these devices, demand upon manufacturers and suppliers of mining supplies was thereby reduced; demand was thus brought more nearly in line with supply and facilities, manpower and equipment were released for the production of products essential to the war effort. In these respects, L–208 was a typical exercise of the allocation authority of WPB. By prohibiting the use or consumption of material by nonessential gold mines, the material and equipment inventories were conserved, thereby assuring its availability if the demands of a war of uncertain duration required. Through Priorities Regulation No. 13, and Order L–208, as amended on November 19, 1942, WPB retained ultimate control over idle inventories of material, machinery and equipment, and the prohibitions placed upon the sale or other disposition of such material assured that transfers of war material and equipment would be made only to enterprises with some degree of essentiality to the war effort.

Moreover, as a result of L–208, a reservoir of used mining equipment and machinery estimated to exceed $75,000,000 became available for transfer to other mining activities and other enterprises of wartime value. Within seven months of its issuance and while many nonessential mines still operated, WPB issued

a substantial number of releases of used mining equipment, which moved in increasing amounts to essential users. In addition, by reducing the load upon manufacturers of mining machinery and equipment, L–208 permitted these concerns to concentrate on essential war production. L–208 also alleviated in some measure the burden upon an over-loaded transportation system and reduced power consumption. Of particular significance is the fact that L–208 freed the manpower theretofore employed by nonessential gold mines for transfer and employment in essential activities, including nonferrous metal mines where it was most urgently needed.

II

There was no intention, or authority, on the part of WPB, to take respondents' property or business. Such a "taking" clearly did not fall under any power of requisitioning exercised by Congress or delegated to WPB, and in addition it is undisputed that that agency did not intend to exercise any power of eminent domain. It was functioning solely as a regulatory agency.

ARGUMENT

INTRODUCTION

In World War II, the task of converting the economy of the United States from a peace to a war basis, and the task of mobilizing and directing the economy to meet the exigencies of total war fell primarily to the War Production Board (WPB). To discharge its responsibilities, the WPB, by delegation from the President, was armed with (among other

things) the statutory war power of the President to allocate material and facilities "in such manner, upon such conditions and to such extent" as "necessary or appropriate in the public interest and to promote the national defense." Section 301 of the Second War Powers Act, *supra,* p. 3. Under these powers, WPB regulated the nation's economy on an unprecedented scale with the objective that all of our resources be utilized with maximum efficiency to produce the munitions and implements necessary to the successful prosecution of the war.

Regulation by the War Production Board assumed a variety of forms but it was primarily through thousands of priorities orders, material conservation orders, and orders limiting, curtailing, or prohibiting production of nonessential products, or prohibiting and restricting the use of critical war materials, that industry was converted to, and mobilized for, war production. Through WPB regulation, raw materials, machine tools, machinery and equipment were channeled from nonessential users to enterprises essential to the war effort and manpower was made available to the mines, factories, shipyards, aircraft plants, and other industries engaged in production vital to the war economy.

Limitation Order L–208, involved in this case, was but one instance of WPB's wartime regulation of American industry. By this order, WPB dealt with the problems of the mining industry which, in the fall of 1942, were so acute that the inadequate production of nonferrous metals—copper, lead, zinc, tungsten, etc.—posed a grave threat to the war program.

L–208 directed gold mines not producing substantial quantities of critical materials to close down and the order also prohibited, within certain time limits, the acquisition or use of any material, facility, or equipment for mining purposes except for restricted uses. By WPB Priorities Regulation 13 and Order L–208, as amended on November 19, 1942, the material, machinery, and equipment thus rendered idle were subject to being channelized to essential users and only to them.

In the Statement, *supra*, pp. 4–14, we have summarized the reasons for, and the necessity of, the issuance of Order L–208. We also set forth in Appendix A, *infra*, pp. 73–110, a detailed history and description of the War Production Board—its creation, its objectives, its powers, and its procedures—as well as a similarly detailed survey of the regulations adversely affecting the gold-mining industry prior to Limitation Order L–208, and a step-by-step study of the evolution of that particular regulation.[11]

The gist of this historical material is, first, that WPB reasonably believed (on the basis of repeated and careful studies, and after other expedients had been tried and had failed) that it was necessary to forbid the operation of nonessential gold-mining so as to channel and force essential mining equipment, material, and personnel into the nonferrous mining which was then vital to the developing war effort; and, second, that Order L–208 did not materially differ from the thousands of other allocation orders

[11] See also the discussion in the Argument, *infra*, pp. 50–69.

issued by WPB to all segments of the economy. It is against this background that the question whether the Fifth Amendment requires the payment of just compensation for the economic hardship sustained by the gold mining industry as a result of this World War II regulation by WPB must be considered.

I

WARTIME RESTRICTIONS ON THE OPERATION OF THE NATION'S GOLD MINES TO PROMOTE THE NATIONAL DEFENSE DID NOT CONSTITUTE A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE COMPENSABLE UNDER THE FIFTH AMENDMENT

A. THE GENERAL PRINCIPLES APPLICABLE TO ALLOCATION AND LIMITATION ORDERS

1. The elements of a constitutional taking

Federal eminent domain law recognizes two general classes of constitutional takings. The *first* is the traditional exercise of the eminent domain power, in which Government officials (*a*) intend to take private property for public purposes, under definite and valid statutory authority, and (*b*) carry out the prescribed formal steps, such as the issuance of a requisition declaration or the filing of a court petition and completion of the judicial condemnation process. Frequently, the Government also takes immediate possession of, and dominion over, the property,[12] but there are

[12] Examples are condemnations of interests in land under the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. 257, requisitions of war materials under the wartime requisitioning statute (Act of October 16, 1941, 55 Stat. 742, as amended, 50 U. S. C. App., 1940 ed., Supp. V, 721), and requisitions of merchant vessels under Section 902 of the Merchant Marine Act, 1936, as amended, 46 U. S. C. 1242.

occasions in which dispossession of the owner is unnecessary to consummate the taking, as under the Declaration of Taking Act, 46 Stat. 1421, 40 U. S. C. 258a–f, providing for irrevocable vesting of title in the United States upon the filing of a declaration of taking and deposit of the estimated award, even though possession has not yet been surrendered. See the Brief for the United States in *United States* v. *Dow*, No. 102, this Term, at pp. 13–18, 27 *et seq.* In both instances, however, it is the admitted purpose of the Government officials to divest the owner of some legally recognized property interest and to transfer that interest to the United States.

The *second* class, on the other hand, does not depend upon the intention of the Government officials. Whatever the official intention may be, certain governmental actions may entail such an actual invasion of property rights that a constitutional taking may be implied, if the actions are not to be held invalid. See *Penna. Coal Co.* v. *Mahon*, 260 U. S. 393, 413; *Block* v. *Hirsh*, 256 U. S. 135, 155–6; *United States* v. *General Motors Corp.*, 323 U. S. 373, 378; *United States* v. *Dickinson*, 331 U. S. 745, 748; *United States* v. *Pewee Coal Co.*, 341 U. S. 114.[13] But though subjective purpose to "take" is unnecessary in this class, it is an essential prerequisite that the governmental invasion affect a

[13] The prime instance, in federal eminent domain, is the destruction of privately owned land by flooding. *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, 809–810. See also *United States* v. *Causby*, 328 U. S. 256 (taking by flights of governmental aircraft) and *Portsmouth Co.* v. *United States*, 260 U. S. 327 (repeated firings of projectiles over owner's land).

legally recognized "property right", and not merely some other economic interest of the plaintiff's (*United States* v. *Willow River Co.*, 324 U. S. 499, 502; *Bowles* v. *Willingham*, 321 U. S. 503, 517–519), and also that the interference with use or possession be so extensive and of such a character that it cannot be done without compensation under the Federal Government's regulatory powers. *Penna. Coal Co.* v. *Mahon*, *supra*; *United States* v. *General Motors Corp.*, *supra*; *United States* v. *Causby*, 328 U. S. 256, 261–3, 264; *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, 804–808. In such cases in which an unintended taking is found to result from federal interference with property interests there must generally be (a) an actual invasion by the Federal Government of private property, (b) some public *use* of that property, and (c) that *use* must be *by* the United States. Perhaps, there are rare instances (hardly likely in wartime) in which mere regulation (without affirmative invasion of property interests) may go so far that it can only be upheld as a taking. But in those cases it must first be determined that the regulation would be unlawful if supported only by the Government's various powers of regulation; the requirement of "just compensation" may then be used in such circumstances to save the Government's action from being stricken as unlawful.[14]

[14] Where a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as title, an easement, a servitude, or a leasehold, *United States* v. *Causby*, *supra*; *United States* v. *Dickinson*, 331 U. S. 745, 748, 751; *United States* v. *Lynah*, 188 U. S. 445, 470–1.

Limitation Order L–208 falls into neither of these two categories. We show below (Point II, *infra,* pp. 69–71) that WPB did not *intend* to requisition or "take" respondents' gold mines, either permanently or temporarily, and that in any event that agency would not have had the power to make such a requisition or "taking". In this point, we show that Order L–208 did not come under the second class of "taking"—that it did not exceed the limits of valid regulation and did not amount to a "taking" of possession or of a property right.

2. Limitations upon the acquisition, use and disposition of private property pursuant to regulatory war powers of the Federal Government do not involve a taking

This Court long has recognized that the Fifth Amendment is not a comprehensive promise to pay for every impairment of use of private property, or for every diminishment in its value, which may be attributable to the exercise of governmental powers. Instances abound in which, under the constitutional powers of the national government, private property is subject to governmental regulation and restriction substantially affecting its use and disposition, and hence its utility and value, but for which there is no constitutional obligation to compensate. This subserviency of private interests to the paramount national welfare is most pointedly demonstrated in time of war when national survival is at stake and the government's demands on its citizens become exacting to the point that, with a common high purpose, private property rights cease to be inviolate, liberty

is restricted, and life itself is subject to sacrifice. Cf. *United States* v. *Macintosh*, 283 U. S. 605, 622; *Legal Tender Cases*, 12 Wall. 457, 461. As the Court said in *Lichter* v. *United States*, 334 U. S. 742, 754:

> In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself. * * *

It is settled, for instance, that under the war powers the Government may confiscate the property of alien enemies in the United States. *Miller* v. *United States*, 11 Wall. 268; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 11; cf. *Johnson v Eisentrager*, 339 U. S. 763. In World War II, even citizens were compulsorily relocated, and restrictions on their personal freedom in the form of curfews and of exclusion from designated areas were imposed and sanctioned by this Court. *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214. And, of course, in World War II, millions of citizens were conscripted for military service, divorced from normal pursuits, and exposed to the hardships and hazards of combat, including possible injury and loss of life.

Recently, the Court, in *United States* v. *Caltex*, 344 U. S. 149, held that the destruction of private property by the military to prevent its falling into the hands of the advancing enemy was not a "taking" compensable under the Fifth Amendment. The Court thus affirmed a principle first announced in 1887 in *United States* v. *Pacific R. Co.*, 120 U. S. 227, arising

out of the Civil War, and later the basis for the holding in *Juragua Iron Co.* v. *United States,* 212 U. S. 297, involving the destruction of property by American soldiers in Cuba because the property was thought to house germs of a contagious disease.[15] In *Caltex,* the Court said (344 U. S. at 155):

> The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign. * * *

The era when loss of and damage to property and personal inconvenience in wartime were primarily confined to the immediate battlefield has long since passed. The power to "wage war successfully"[16] in the present age is "not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war." *Hirabayashi* v. *United States,* 320 U. S. 81, 93. The power to wage war successfully "permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation" (*ibid.*). Losses incidental to restric-

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[15] See also, *Respublica* v. *Sparhawk,* 1 Dall. (Pa.) 357.

[16] Charles Evans Hughes, *War Powers Under the Constitution,* 42 A. B. A. Rep. 232, 238; *Home Bldg. & L. Ass'n.* v. *Blaisdell,* 290 U. S. 398, 426.

tive governmental measures adapted to these ends are, though remote from the field of battle, nonetheless attributable to "the fortunes of war" and must rest where they fall.

In this category belong the losses and economic hardships stemming from price and rent control measures of World Wars I and II, sustained by this Court as valid wartime restrictions upon private property free of the "just compensation" provision of the Fifth Amendment. *Bowles* v. *Willingham*, 321 U. S. 503, and *Yakus* v. *United States*, 321 U. S. 414. In *Bowles* v. *Willingham*, the Court recognized that it is the nature of regulation to reduce the value of the property regulated and that a member of a regulated class may suffer economic losses not shared by others; a landlord's property "may lose utility and depreciate in value as a consequence of [rental] regulation." And even though rent restrictions were claimed to deprive the landlord of a fair return on his property, the Court said (321 U. S. at 519):

> A nation which can demand the lives of its men and women in the waging of * * * war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property.[17]

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[17] See, also, *Block* v. *Hirsh*, 256 U. S. 135; *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188; *Highland* v. *Russell Car Co.*, 279 U. S. 253; *Wilson* v. *Brown*, 137 F. 2d 348 (Em. Ct. App.); *Taylor* v. *Brown*, 137 F. 2d 654 (Em. Ct. App.), certiorari denied, 320 U. S. 787; cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, 569–570; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392–396.

The Court has also held it not to be a taking for the Government to restrict the right to earn profits in wartime, by the recouping of excessive profits. *Lichter* v. *United States*, 334 U. S. 742, 787.

In World War I, Congress, "for the purpose of conserving the man power of the nation, and to increase efficiency in the production of arms, munitions, ships, food, and clothing for the Army and Navy" (40 Stat. 1046), declared it unlawful to sell for beverage purposes distilled spirits and prohibited the removal of spirits in bond for beverage purposes for the duration of the war. This Act was sustained by the Court as a valid war measure, and, although substantial damage to the distilleries from the restrictions thus placed on their property was apparent, it was held that the restrictions upon the sale of distillers' property could not be regarded as a "taking" in the constitutional sense. *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156–158. See, also, *Mugler* v. *Kansas*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1.

In *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, also arising out of the World War I prohibition acts, the Court sustained a prohibition upon the manufacture and sale of beer which became effective immediately upon passage of the Volstead Act (41 Stat. 305). *Inter alia*, the petitioner contended that, because of the loss resulting from the inability to use its property for brewery purposes, the prohibition could be legally effected only provided compensation was made (251 U. S. at 302). The Court rejected the argument. Petitioner's loss "is an incident of the peculiar nature of the property and of the war need which, we must

assume, demanded that the discontinuance of use be immediate" (251 U. S. at 302). "Here, as in *Hamilton* v. *Kentucky Distilleries & Warehouse Co.* [251 U. S. 146], there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use" (251 U. S. at 303).[18]

In the *Hamilton* and *Ruppert* cases, *supra*, Mr. Justice Brandeis analogized the regulative-restrictive, but noncompensatory, powers of the federal government over private property to the regulative-restrictive powers of state governments under the police power.[19] The latter, without any constitutional necessity of compensation, embraces, of course, not only the power to prohibit the manufacture and sale of an otherwise lawful commodity (*Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678) but, in its extreme, the power to destroy in the pub-

[18] See also, *Omnia Commercial Co.* v. *United States*, 261 U. S. 502, where it was held that a frustration of a purchaser's rights under a private contract because of government requisition of the seller's product was not a taking compensable under the Fifth Amendment: "That provision has always been understood as referring to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts." *Ibid.*, at p. 510, quoting 12 Wall. 457 at 551 and *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467 at 484.

[19] To the same effect, see *Bowles* v. *Willingham*, 321 U. S. 503, 518; *Block* v. *Hirsh*, 256 U. S. 135.

lic interest private property without state liability (*Miller* v. *Schoene*, 276 U. S. 272; *North American Storage Co.* v. *Chicago*, 211 U. S. 306; *Lawton* v. *Steele*, 152 U. S. 133).[20] In *Mugler* v. *Kansas*, 123 U. S. 623, involving a state prohibition statute, the Court said (123 U. S. at 668–669):

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.

And again (123 U. S. at 669):

> The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of

[20] In some circumstances, private property may be destroyed even to promote the public convenience or the general prosperity of the state. *Miller* v. *Schoene*, 276 U. S. 272; *C. B. & Q. Railway* v. *Drainage Comm'rs.*, 200 U. S. 561. And it is settled that the destruction of private property in the path of a conflagration to prevent the spread of the fire is not a "taking". *Bowditch* v. *Boston*, 101 U. S. 16; *Field* v. *City of Des Moines*, 39 Iowa 575; *American Print Works* v. *Lawrence*, 23 N. J. L. 590, 605–607, 615; *McDonald* v. *City of Red Wing*, 13 Minn. 38.

> property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is thus clear that there is no inherent right to use property in a way that is detrimental to the public interest. The *Hamilton* and *Ruppert* cases and other decisions of this Court attest that—where the public interest is involved, and particularly in wartime—to restrict and even to destroy is not to "take" in a constitutional sense, and that the power of a nation at war to restrict or to prohibit the use of property because, in the judgment of those whose responsibility it is to determine, the use impairs or its non-use contributes to the war effort, is no less extensive than the power of the state to impose similar restrictions upon property in the name of the health, morals, or safety of the community.[21]

To be sharply contrasted with these principles and these decisions are the cases, relied upon by respondents, in which a taking was found. *E. g., United States* v. *Pewee Coal Co., Inc.*, 341 U. S. 114; *International Paper Co.* v. *United States*, 282 U. S. 399;[22]

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[21] See also *Marion & Rye Valley Railway* v. *United States*, 270 U. S. 280; *Morrisdale Coal Co.* v. *United States*, 55 C. Cls. 310, affirmed, 259 U. S. 272; 19 Geo. Wash. L. Rev. 184.

[22] In *International Paper Co.* v. *United States*, 282 U. S. 399, the Court held that, by requisitioning the entire power potential of the Niagara Falls Power Co., the United States was obliged

Portsmouth Co. v. *United States*, 260 U. S. 327; *Kimball Laundry Co.* v. *United States*, 338 U. S. 1; *United States* v. *Causby*, 328 U. S. 256; *United States* v. *General Motors Corp.*, 323 U. S. 373; *United States* v. *Welch*, 217 U. S. 333. In each of these cases where compensation was allowed, there was actual dispossession of the owner, physical invasion, occupation or use of the property by the United States. See *supra*, pp. 26–29. Short of such actual appropriation, however, the decisions of the Court make it clear that temporary wartime restrictions upon the use or disposition of private property, such as were imposed by L–208, are not "takings" in the constitutional sense but are valid as wartime economic regulations.[23]

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to compensate the International Paper Co., which by lease and conveyance from the Power Co. was entitled to a fixed proportion of the power potential. The lease and conveyance under New York law was a corporeal hereditament and real estate. In holding that the Government had taken the Paper Company's right for public use, the Court said: "Our conclusion upon the whole matter is that the Government intended to take and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power * * *." *Ibid.*, at 408.

[23] In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, at 415, the Court, as an aside, said that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The question in that case arose against a peacetime background, the extent of public interest involved was limited, and the restriction was permanent and for the particular benefit of a single private house. We think the statement has little applicability in time of war when the national interest is supreme and the restriction upon private

3. In particular, wartime allocation, limitation, and priority orders do not result in a taking

(*a*) Economic hardships or losses, such as underlie respondents' claims, attributable to wartime allocation of materials and facilities have been specifically upheld as not constituting a taking; and such allocation orders have been sustained as valid regulation. *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815; see *Steuart & Bro.* v. *Bowles,* 322 U. S. 398; *Brown* v. *Wilemon,* 139 F. 2d 730 (C. A. 5), certiorari denied, 322 U. S. 748; *Gallagher's Steak House* v. *Bowles,* 142 F. 2d 530 (C. A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co.* v. *United States,* 143 F. 2d 222 (C. A. 5), certiorari denied, 323 U. S. 749; *Henderson* v. *Bryan,* 46 F. Supp. 682 (S. D. Cal.).

The economic hardship resulting from such allocations and its non-compensatory character was recognized in *Steuart & Bro.* v. *Bowles, supra,* where the Court said (322 U. S. at 405):

> * * * Certainly, we could not say that the President would lack the power under this Act [the Second War Powers Act] to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our

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property, addressed to an industry, is only for the temporary period of hostilities. "A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." *Block* v. *Hirsh,* 256 U. S. 135, 157.

> armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business.

The loss due to the wartime allocation of materials, foreseen in *Steuart & Bro.* v. *Bowles, supra,* came to light in *St. Regis Paper Co.* v. *United States,* 110 C. Cls. 271, certiorari denied, 335 U. S. 815. The WPB had ordered that no plant in a defined area should, after October 28, 1942, consume, process, or deliver soft pulpwood except with the specific authorization of WPB.[24] This order, as it affected St. Regis, required that its plant remain closed from November 1, 1942 to April 1, 1944. St. Regis brought suit in the Court of Claims, claiming damages of over 3¼ million dollars as a result of the WPB orders and directives, which, it was alleged, amounted to a Fifth Amendment taking of its property requiring just compensation. On demurrer to the petition, the court phrased the issue before it in the following terms (110 C. Cls. at 274):

> * * * [W]hether the exercise of the President's war powers through general orders and directives of the War Production Board allocating and controlling the consumption of pulpwood as a defense measure constituted taking by the Government of plaintiff's property

[24] WPB Order M-251 (7 Fed. Reg. 8424), Schedule I (7 Fed. Reg. 8686).

> for public use within the meaning of the Fifth Amendment to the Constitution..

The petition was dismissed, the court stating: "This is a case of actual hardship. The damages are both real and substantial" (*id.*, at 279). But the "action was taken [by WPB] as a defense measure" and (*id.* at 274 and 275):

> It is not sufficient that damages have resulted or that hardships have occurred. War inevitably produces hardships, suffering and losses, some of which cannot be measured in money. Legitimate war powers must be exercised, whatever the cost. Otherwise everything is lost. * * *

(*b*) With our complex society, the United States cannot assume a rigid and unlimited liability for the adverse economic consequences of such wartime allocations (and similar) orders. The claims of respondents and approximately 150 other claimants based on L–208 have an aggregate value estimated to exceed forty millions of dollars. L–208 is but one of approximately 350 similar L orders and one of thousands of L, M, P and other type orders issued by the WPB and the OPM (Office of Production Management) during the course of the war, resulting in severe financial losses to innumerable businesses. It is difficult to distinguish between the legal effect of these orders and L–208. If the economic consequences of L–208 and similar orders were to be assumed by the Government, serious financial burdens upon the public treasury would result.

Forty-eight curtailment or shut-down orders were issued by WPB prior to March 14, 1942, and in the same period a total of 91 conservation orders effecting curtailment or prohibiting the use of critical or scarce materials, or controlling their distribution, were issued. Between March 16 and April 9, 1942, 25 "L" orders were issued by WPB stopping or curtailing the manufacture of such products as passenger automobiles, stoves, refrigerators, office equipment, domestic laundry equipment, automatic phonographs, metal windows, metal toys and games, metal signs, domestic vacuum cleaners, vending machines, metal household furniture, metal caskets and vaults, and lawnmowers.[25] In addition, as the Truman Committee was advised in April, 1942:[26] "Many industries are shut down or drastically curtailed today because required materials have been cut off by conservation orders although no shut-down or curtailment order addressed to the specific industry has been issued."

Each of the allocation orders issued by WPB, in varying degree, had serious economic repercussions, sometimes on an industry-wide basis, more often perhaps on an individual basis. Thus, as a result of a survey conducted in May of 1942, WPB predicted that 24,308 manufacturing establishments, out of a total of 183,241, would be forced to shut down before October 1, 1942, as a result of more than 250 "L" and "M" orders then issued by the Board. The net sales

[25] 77th Cong., 1st Sess., Special Committee Investigating the National Defense Program, U. S. Senate, *Hearings*, Pt. XII, Exh. No. 497, p. 5341.

[26] *Ibid.*, p. 4993.

of these manufacturers in 1939 accounted for approximately 8 per cent or $4,127,000,000 of total net sales of all manufacturers. Altogether, it was estimated that some 78,695 establishments would not be needed in war production.[27]

The accuracy of WPB's 1942 prediction as to business shut-downs as a result of its regulation is unknown. The decline in the number of business concerns, however, indicates that the adverse economic consequences of World War II upon American business were widespread and substantial. In the years 1942, 1943, and 1944, the total concerns in business in the United States, exclusive of finance, insurance, real estate, transportation, and amusement enterprises, declined by 201,417. Of this total, only 13,848 were "business failures." *Statistical Abstract of the United States,* 1956: United States Department of Commerce, p. 501. It is fair to assume that a large part of this decline was due to the demands of the wartime economy, and the interacting effects of wartime regulation.

To hold the United States liable for "just compensation" for these losses would impose an incalculable and staggering financial burden on the nation, and at the same time would discriminate against those who suffered monetary loss, of one kind or another, by being drafted into the armed forces or who vol-

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[27] Industrial Mobilization For War, *History of the War Production Board and Predecessor Agencies, 1940–1945,* Vol. I, p. 322; cf., 77th Cong., 1st Sess., Special Committee Investigating the National Defense Program, U. S. Senate, *Hearings,* Pt. XII, pp. 5283–5341.

unteered their services for military or civilian work. And to single out the gold industry for full compensation would be an even grosser discrimination.

In light of the experience of World War II and more recently the Korean conflict, it may be reasonably assumed that a preponderant majority of people and business concerns will continue to accept in the spirit of patriotism the hardships, inconveniences, and economic sacrifices required by present day warfare in the same fashion that they are accepted by military personnel who must do the actual fighting. If the World War II hardship to the gold mining industry merits redress by the Government—which we do not believe—Congress is the appropriate organ of Government to make a voluntary grant of compensation, just as Congress has done in certain instances of particular hardship.[28] That Congress has never made such a grant emphasizes the lack of equity in respondents' position and the similarity of the losses of the gold mining industry to those of innumerable other busi-

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[28] *E. g.*, the Act of July 2, 1948, 62 Stat. 1231, 50 U. S. C. App. 1981 *et seq.*, which, with limitations, provides a system for compensating persons of Japanese ancestry for damage to or loss of real or personal property resulting from the World War II evacuation and exclusion order.

And see the Philippine Rehabilitation Act of 1946, 60 Stat. 128, 50 U. S. C. App. (1946 ed.) 1751 *et seq.*, which provides a scheme for compensation of losses attributable to military action by enemy and friendly forces on the Philippines in World War II. See, Schein, *War Damage Compensation Through Rehabilitation: The Philippine War Damage Commission*, 16 Law & Contemp. Prob. 519.

nesses prejudiced by wartime measures.[29] To compensate as a matter of legislative grace is one thing; it is, however, a far different matter to formulate a rigid constitutional doctrine which would require the United States to bear the indirect costs of war such as are typified by respondents' claims. To impose this indirect limitation upon the war power of the federal government is, apart from the possibly prohibitive cost, a step of the gravest sort, in view of the demands of modern war for the full mobilization of the nation's resources.

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[29] Congress has been unwilling to go further (see Appendix A, *infra*, p. 107, n. 20) than to authorize the Court of Claims to hear and render judgment on the claims of gold mine operators without regard to any statute of limitations, laches, or lapse of time. Act of July 14, 1952, 66 Stat. 605, *supra*, pp. 3–4. Respondents unsuccessfully urged in the Court of Claims that this Act was a mandate from Congress to the court to award compensation wherever it was proved that losses were incurred as a result of L–208. The Act, passed more than six years after any claim based upon L–208 could have accrued, shows on its face that it is nothing more than a Congressional waiver of the statute of limitations or the defense of laches which would otherwise be applicable to many if not all of the L–208 claims filed in the Court of Claims after the decision in *Idaho Maryland Mines Corp.* v. *United States*, 122 C. Cls. 670. See S. Rept. No. 1605, 82d Cong., 2d Sess.; H. Rept. No. 2220, 82d Cong., 2d Sess. (R. 1559–1572). "At the present time many other claimants who may have as good a right for an adudication of their claims as does the Idaho Maryland Mines Corp. may not prosecute such claims due to the running of the statute of limitations. Many of the claimants after the ruling of the Oro Fina case undoubtedly felt that to file in the Court of Claims would be useless and, therefore, allowed the statute to run against them * * *" (R. 1561).

B. LIMITATION ORDER L–208 WAS A RATIONAL AND VALID EXERCISE OF THE ALLOCATION AUTHORITY, WAS IN THE PUBLIC INTEREST, AND WAS DESIGNED TO AND DID PROMOTE THE NATIONAL DEFENSE

1. (*a*) It is indisputable, in the first place, that Limitation Order L–208 took absolutely nothing for the Government in the physical sense. In nonessential gold mines, the order prohibited the acquisition and use of critical materials; as amended on November 19, 1942, the disposition of vital mining machinery and equipment was subjected to WPB control and provision was made for channeling this material to essential enterprises. But the operators of nonessential mines were not required to sell or otherwise dispose of any material or equipment (*Bowles* v. *Willingham*, 321 U. S. 503, 517); the title and possession of personal property was not disturbed, nor was there dispossession or occupation of any part of the realty. The United States took no gold; as much gold remained for extraction when the restrictions of L–208 were lifted as when they were imposed. *Or Fino Consolidated Mines, Inc.* v. *United States*, 118 C. Cls. 18, 29–30, certiorari denied, 341 U. S. 948. There was no public *use* of respondents' property *by the Government.*

(*b*) Likewise, the case presents no question as to the power of Congress as a war measure to allocate material and facilities, no question as to the validity of its delegation of that power to the President, and no issue as to the validity of the President's delegation

to the WPB.[30] It is, moreover, common ground that respondents' mines, pursuant to this power, were subject to regulation. As said by the Court of Claims (R. 43): "That such an industry could be regulated, and strictly regulated in wartime, is unquestioned, and resulting losses are not compensable if the action taken is truly regulatory in nature."

(*c*) The most casual consideration of the losses sustained by innumerable other businesses as a consequence of the impact of government wartime regulations suggests that, if respondents' contentions were successful, the result would be to create a unique privileged class of corporations mining gold immune from the common burdens and sacrifice of war. The fact is, however, that one producing and dealing in gold would appear to have less standing for a claim to a constitutional grievance than other businesses affected. This Court pointed out in *Norman v. Baltimore & Ohio Railroad Co.* (the Gold Clause Cases), 294 U. S. 240, 304, that by virtue of the national power over the coinage of money, there attaches to the ownership of gold special limitations which public policy may require. The Court pointed out that those limitations arise from the fact that the law gives to gold "a value which does not attach as a

[30] The Court of Claims expressly disclaimed that it was holding L–208 to be an invalid order. In denying the Government's motion for a new trial, the court stated: "The court did not hold, as counsel for defendant says it did, that L–208 was an invalid order. [R. 144.] * * * The court did not hold that there was anything illegal about the issuance of L–208 so far as its provisions were concerned." (R. 147.)

mere consequence of intrinsic value," and the power to coin money includes the power to forbid the exportation of gold to prevent its outflow from the country of its origin.

As Attorney General Homer Cummings said in his oral argument to the Court in that case (p. 257):

> Those who insist upon the strict letter of the bond are insisting upon it in a matter dealing with gold, and gold lies at the basis of our financial structure. Gold is the subject of national legislation. Gold is the subject of international concern. Gold is not an ordinary commodity. It is a thing apart, and upon it rests, under our form of civilization, the whole structure of our finance and the welfare of our people. Gold is affected with a public interest. These gold contracts, therefore, deal with the very essence of sovereignty, for they require that the Government must surrender a portion of that sovereignty. To put it another way, these gold contracts have invaded the federal field. It is not a case of federal activity reaching out into a private area. So obsessed are our opponents by the idea of the sanctity of contracts that they are even prepared to assert their validity when they preempt the federal field. To me this seems a monstrous doctrine. These claimants are upon federal territory. They are squatters in the public domain, and when the Government needs the territory they must move on.

Whether the national power under the coinage authority of the Constitution extends to the suspension of gold production, in addition to its exportation, is

not at issue because there was no purported exercise of that power. Reference to the power merely emphasizes that those engaging in gold production have no special immunities from the hardships of war.

2. In these circumstances, this case would seem plainly controlled by the prior decision of the court below in *St. Regis* (discussed *supra*, pp. 39–40), with respect to a wartime pulpwood allocation order. And the Court of Claims held in its earlier gold-mining decision, *Oro Fino, supra,* that L–208 was no different in effect from Order M–251, involved in *St. Regis,* and differed in form only in that, in recognition of the lack of adaptability of nonessential mines to a war economy, it directed that operators of nonessential mines close down. This distinction, the Court of Claims correctly held in *Oro Fino* to be without relevance (118 C. Cls. at 29) for the obvious reason that the closing would in any event have been an inevitable consequence of the prohibitions imposed upon the use and acquisition of material and machinery essential to any mining operation. As stated by a unanimous court (*ibid.* at 29): "We decline to hold that the government may not do directly what we have already held [in the *St. Regis* case] it may do indirectly."[31] The prohibitions in L–208 upon the acquisition, use and disposition of material and

[31] While the United States does not agree with the Court of Claims' decision in *Edward P. Stahel & Co., Inc.*, v. *United States*, 111 C. Cls. 682, certiorari denied, 336 U. S. 951 (see, Cross-petition for a Writ of Certiorari, No. 623, Oct. T., 1948), it is clear that that case is presently inapposite since respondents do not seek compensation for their inventories of material, equipment and machinery immobilized by L–208.

equipment necessarily resulted in the suspension of gold mining operations independently of paragraph (b) (1) of the order directing the closing of the mines. As Chief Judge Jones of the Court of Claims pointed out in dissenting in this case (R. 58–59):

> * * * paragraphs (b) (2) and (3) of the same order, which forbade the use of critical materials in nonessential industry, were valid exercises of the President's power under the allocation statute and they would have produced the closing down of the mines whether or not paragraph (b) (1) had been included. * * * Since the valid portions of the order would have produced the closing of the mines, the added part of the order becomes immaterial.

Doubtless, Order L–208 resulted in hardship to respondents, but, as we have pointed out (*supra*, pp. 40–44), that hardship was by no means unique. The gold-mining industry would appear to have been treated no differently and no more harshly than numerous other industries and business concerns. The burden placed upon nonessential industries by various WPB orders was a heavy one even if insignificant when compared to the hardship and sacrifice of those who manned the battlefields. And if the economic burden was onerous in the case of the gold-mining industry it was because there was no role for it to play in the war economy. But Congress, in authorizing the wartime allocation of materials and facilities, made no provision for the compensation of losses attributable to the exercise of this broad and essential power.

3. When it came to the present cases, the Court of Claims declined to follow the *St. Regis* case because L–208 did not in its view:

> * * * require the gold mine owners to hold for the use or disposition of the Government their inventories and supplies of the personal property covered by the order but left the owners free to use that personal property in any way they wished except in the mining of gold. The plaintiffs might have sold their inventories of machinery, supplies and equipment to any user whether or not that user was conducting a business which was essential to the defense effort [R. 27]. * * * [and because L–208] distributed nothing because the order contained nothing which required the gold mine owners to sell those items to the more essential users [R. 32].

These assertions, and others by the court to the same effect,[32] are demonstrably inaccurate.

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[32] "* * * Despite numerous appeals and a desire on the part of WPB officials to modify the order to permit the gold mines to operate at least on a break-even basis, the order was continued in effect and unchanged until the summer of 1945 [R. 19].

"* * * In L–208 WPB did not even attempt to assure that those critical materials, equipment and facilities would be held for possible future requisition or order, but left the owners free to sell them to anyone they pleased, whether the prospective purchaser was engaged in essential defense work or not [R. 19].

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"* * * If L–208 had not only denied the gold mines the right to acquire materials, equipment and facilities but had ordered the mine owners to cease using what they had on hand, to hold them for the possible use of the Government, and not to dispose of them to anyone but the Government or its designees, such an order would have amounted to a taking by the Gov-

Section (k) of L–208 provided as follows (R. 104):

> This order and all transactions affected thereby are subject to all applicable provisions of the Priorities Regulations of the War Production Board, as amended from time to time.

Priorities Regulation No. 13 was issued by WBP on July 7, 1942 (7 Fed. Reg. 5167) and was in effect throughout the period L–208 was in effect. See 8 Fed. Reg. 4502, 32 C. F. R. Cum. Supp. 944.34. Priorities Regulation No. 13 set out rules governing sales of "idle or excess materials * * * by persons who, by reason of the effect of priority orders or for other reasons, cannot use such materials in the regular course of their business" (7 Fed. Reg. 5167). In general, this regulation permitted the sale of any material *other than a war material* without restriction. War material was defined to mean "any material consisting in whole or in substantial part of one or more materials listed in Schedule 'A'." *Ibid.* Schedule "A" (7 Fed. Reg. 5169–5173) enumerated approximately 160 metals, chemicals, and miscellaneous items, including steel, copper, lead, zinc, tin, glycerine, cyan-

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ernment of those materials, facilities and equipment, whether the Government or its designees ever actually took physical possession of them or not, and the loss of the gold mine owners' ability to carry on their business would have been consequential to the taking of the materials, equipment and facilities and would not have been compensable under the Fifth Amendment.

"L–208 did not do any of the above things except to deny the gold mine owners and operators the right to acquire additional materials, facilities and equipment. * * *" (R. 44).

amid, rubber, to name but a few.[33] Sales of "war material" were authorized only to designated defense agencies of the Government or only with the specific authorization of WPB or only to buyers within the classes described in Schedule "A." 7 Fed. Reg. 5167–5168. Thus, it is clear that only as to material other than war material were the mine operators free to do as they liked with material and equipment idled by L–208; on the other hand, war material was subject to rigid WPB control.

Moreover, the amended form of L–208 (R. 1574C–D), issued November 19, 1942 (7 Fed. Reg. 9613, App. B, *infra,* pp. 114–118), prohibited the sale or other disposition or acceptance of delivery of machinery or equipment except with the express permission of the WPB. See, also, L–208, as amended August 31, 1943 (8 Fed. Reg. 12007–12008, App. B, *infra,* pp. 118–125). In the light of Priorities Regulation No. 13 and the amendments to L–208, it is clear, we submit, that the court's conclusion that there were deficiencies in L–208, depriving it of its allocation character, is entirely without foundation.[34]

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[33] A rough tabulation of Homestake's "net requirements" for 1942, submitted by Homestake on January 13, 1942 (R. 1586–1587), includes the following critical items (R. 1588): 43 tons "straight" iron and steel, 8,453 tons fabricated iron and steel; 46 tons machined iron and steel; 135 tons manganese steel; 12 tons of copper; 13 tons of lead; 0.50 ton of tin; 28 tons of zinc; 0.14 ton aluminum; 0.75 ton asbestos; 80 (*sic*) tons mercury; and 11.75 tons of rubber.

[34] These inaccuracies in the court's opinion, critical to its decision, indicate a lack of awareness of the existence of these amendments to L–208.

4. While the ruling of the court below that L–208 was a taking, rather than a noncompensable regulation of the use and disposition of respondents' property, is unsound because of the court's apparent oversight with respect to Priorities Regulation No. 13 and the amendments to L–208, other statements in the court's opinion also require consideration. These are the conclusions that (*a*) L–208 "was not in fact necessary to the successful prosecution of the war" (R. 43); (*b*) that L–208 was not devised for the purpose of conserving or allocating materials and, with a particularly myopic appraisal of the results of L–208, that it did not in fact do so; and (*c*) that the issuance of L–208 in order to divert manpower to essential nonferrous mines was, in effect, ill conceived, unwise, and unsuccessful. We now show that each of these other conclusions by the Court of Claims cannot be sustained.

(*a*) *Necessity.*—In *Hirabayashi* v. *United States,* 320 U. S. 81, at 93, the Court, in passing upon the validity of the World War II curfew order, said:

> Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

Again, in *Block* v. *Hirsh,* 256 U. S. 135, at 158, with respect to World War I rental restrictions applicable to the District of Columbia:

> * * * we have no concern of course with the question whether those means [of Congress] were the wisest, whether they may not cost more than they come to, or will effect the result desired.

In *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, at 161, Mr. Justice Brandeis said:

> No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress. [Citations omitted.] Nor may the court enquire into the wisdom of the legislation. [Citations omitted.] Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence. [Citation omitted.]

We submit that these principles, delineating the limits of judicial inquiry into legislative and executive action in time of war, are fully applicable in the present circumstances.

L–208 was issued by the WPB as an exercise of the allocation powers delegated by Congress to the President in the Second War Powers Act, and, in turn, delegated by the President to WPB (*infra*, pp. 76–77). The necessity for the exercise of the delegated power, the "manner" in which it was to be exercised, the "conditions" upon and the "extent" to which it was to be exercised, were validly entrusted to the WPB. It cannot be denied that these were matters which required the exercise of judgment and discretion in the plainest sense. In the considered and deliberative judgment of the WPB, there was ne-

cessity and justification for prohibiting the use and acquisition of materials to stop gold production in mines not producing substantial quantities of critical materials. See Appendix A, *infra*, pp. 86–108. We doubt that it is wise or proper for a court now to sit in judgment on the wisdom or necessity of the Board's action.

The decision to issue L–208 was made upon the unanimous recommendation of the WPB (R. 101) and with the approval and at the urging of the War Department (R. 99, 101). Upon its issuance, L–208 was, in effect, approved by the President (R. 107). It hardly needs saying that these were responsible men, selflessly dedicated to winning the war in the shortest possible time. Though fully aware that hardships would follow, they were satisfied with the necessity of the order and it is not unfair to say that, with their intimate knowledge of the world situation and of the strategic and logistical problems of a nation and world at war, they were in a better position to judge the necessity of L–208 than others far removed from the stress of the emergency conditions which prevailed in 1942.

And the judgment of these men is not the less sound nor the less entitled to respect because the Chief of the WPB Mining Branch, Dr. Nelson, opposed the order.[35] The WPB was purposely staffed

[35] Dr. Nelson's opposition to the order appears to have been based, not upon its necessity, but upon the fear that the mine labor released from the gold mines could not effectively be diverted to the nonferrous metal mines (R. 78–79, 488–494).

by its Chairman, Donald M. Nelson, so as to include all shades of opinion within the Board. In addition to men from big business, there were brought into WPB men from small business, men from trade unions, economists from within and without the Government, university professors, and government career administrators.[36] Unanimity of opinion within such a heterogeneous staff could hardly be expected. Few major policy decisions were made without dissenters, if not on the Board itself, then from within the ranks.[37] The issuance of L–208 was no exception. But it was the responsibility of the Board and its Chairman to resolve differences of opinion and this they did when it became necessary to make a policy decision with respect to nonessential gold mines. Their decision had to be made without benefit of hindsight; L–208 was deemed necessary to the national defense and to the public interest in 1942; it must be accepted as such in 1957.

Viewed, as it must, in a wartime context, there can be small room for doubt as to the necessity and justification for L–208. The exigencies of the world situation in 1942 are matters of public notoriety (Appendix A, *infra*, pp. 73–75, 108), well known to this Court. *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; *Bowles* v. *Willingham*, 321 U. S. 503; *Yakus* v. *United States*, 321 U. S. 414; *Steuart & Bro.* v. *Bowles*, 322 U. S. 398;

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[36] *Industrial Mobilization for War, History of the War Production Board and Predecessor Agencies, 1940–1945*, pp. 231–236.

[37] 77th Cong., 1st Sess., Special Senate Committee Investigating the National Defense Program, *Hearings*, pp. 4957 *ff.*

Lichter v. *United States*, 334 U. S. 742. The necessity for L–208 was born of these wartime exigencies; the lack of adaptability of the gold mining industry to the economy of a nation geared and mobilized for total war provided the justification.

The short of it is that the United States was engaged in a global war that, on an ever increasing scale, was, in October 1942, already taxing national resources to the utmost. It was a war of uncertain duration and, as later events proved, was only in its infancy in October 1942. The drain of offensive warfare on manpower and material had yet to be experienced when the WPB formulated its policy with respect to non-essential gold mines.

In October 1942, inadequate production of nonferrous metals was imperiling the entire war production program which was already falling far short of the production objectives fixed by the President in January 1942.[38] The acute shortage of vital nonferrous metals—copper, lead, tungsten, etc.—was traceable to the tremendous demands of the munitions program and lagging production was attributable primarily to a shortage of mining labor and also to shortages of mining equipment and machinery and a host of other materials essential to the maintenance and operation of mines. WPB sought to remedy these problems and to do so logically directed its attention to the gold mining industry which was utilizing and consuming manpower, machinery and equipment and other material but, with the exception of gold mines producing

[38] *Industrial Mobilization for War*, *op. cit.*, p. 507.

substantial quantities of critical materials, was making no contribution to the war program. We show below (pp. 61–69) that L–208, in varying degree, effectively accomplished its objectives (R. 8). But whether it did or did not, or whether it cost more than its accomplishments were worth, it cannot be said even at this late date that L–208 was unnecessary or unjustified or had no reasonable relation to its legitimate end, much less that it was arbitrary as respondents would have it.[39]

(*b*) *Purpose.*—Neither can it be said that L–208 was not devised nor intended to conserve and allocate critical material, equipment or supplies (R. 19). The preamble to the order was as follows (R. 102):

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.

[39] The fact that mining equipment and machinery was shipped abroad in limited quantities for use in gold mines in South Africa and Canada, at the same time such material was being denied to domestic gold mines, affords no ground for argument against the necessity or justification for L–208. The continued shipment of such material to foreign countries was a policy decision made at the highest level of government and was based upon economic, political and monetary considerations of broad international implication (R. 100–101, 1170–1171, 1173, 1174, 1175, 1179, 1607). These considerations were, of course, utterly foreign to the domestic production of gold and to the domestic gold mining industry.

By its terms, L–208 prohibited the acquisition of new material essential to maintenance and operation. The demand for such material was thereby reduced, thus bringing demand more nearly in line with supply.[40] L–208 prohibited the use or consumption of any material, facility, or equipment, and thus the inventories of nonessential mines were conserved, thereby assuring their future availability if the demands of a war of uncertain duration required. L–208 prohibited the use or consumption of material and facilities on hand and such items thereby became available for sale, rental, lease or exchange to essential enterprises. Through Priorities Regulation No. 13, and the amendments to L–208 (*supra*, pp. 50–52), WPB retained ultimate control over inventories; this assured that "war material" and vital mining machinery and equipment idled by the order would be disposed of only where its disposition would contribute to the war effort.[41]

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[40] "* * * Through the L orders the Board took direct action to cut down on the authorized demand for materials for the purpose of bringing that demand somewhere near the available supply of materials. And this was precisely what had to be done, for to make it possible for a system of materials allocation to work it was essential to lop off the excess demand for materials. This the Board did by banning the manufacture of nonessential products. * * *" *Industrial Mobilization For War*, *op. cit.*, p. 309.

[41] The technique employed by WPB in L–208 was typical of that used in any number of "L" orders as can be seen from the description of "L" orders given the Truman Committee in 1942 by the Director of Industry Operations, WPB (77th

To deny that L–208 was an allocation order or that it was not intended as an allocation order is to deny what is apparent from the face of the order, its amendments, and Priorities Regulation No. 13, to which it was subject. Nor is it any the less an allocation order because, as a necessary consequence of the order, manpower theretofore employed by nonessential mines would become available for employment in essential enterprises. Concededly, the diversion of manpower to essential mines was a motivating factor in the issuance of L–208. But neither respondents

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Cong., 1st Sess., Special Senate Committee Investigating the National Defense Program, *op. cit.*, p. 5058):

> * * * our first step is basically to put industry on notice that they are in jeopardy; to make, so far as we can, a quick study of the inventory situation, the amount of material in process, the amount of the end production which is necessary for war purposes or minimum civilian economy, and then to decide upon the nearest date when a prohibition or limitation should, in the light of all these factors, be made effective. An order is then issued which, in the usual case, prohibits as of the date of issuance the purchase and receipt of any further critical materials except insofar as they may be necessary in small quantities to complete partly fabricated articles, and also provides a final cut-off date for production, generally 30 or 60 days from the date of issuance of the order.
>
> During this interim period, operations are permitted at a reduced rate based upon the extent to which it is deemed advisable to permit the use of the inventory, and the desirability of keeping the management and key personnel of the plant together during the conversion period. The orders generally provide for permission to fabricate repair parts to the extent possible without the use of scarce materials. The orders require reports on inventories of scarce material on hand at the date of issuance and an estimated inventory at the cut-off date.

nor the Court of Claims have suggested that manpower considerations were not a legitimate subject of WPB concern or that this motive on the part of WPB was ulterior or evilly-inspired; rather, the most that can be said is that L–208, considered as an instrument for diverting manpower to nonferrous metal mines, was not as effective as it was expected to be. Cf. *infra,* pp. 65–69. Disregarding the hindsight inherent in this attack upon L–208, it is settled that if executive action is justified by a lawful purpose, it is not rendered unlawful by the motive of those responsible for the action even if that motive were otherwise illegal. *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 145, and cases cited; *United States* v. *Rock Royal Co-operative,* 307 U. S. 533, 559–560. L–208 was a rational and reasonable exercise of the allocation authority of WPB; the motives of WPB in issuing the order were proper ones and the fact that its objectives may not have been fully achieved did not deprive it of its allocation character nor convert the order, regulatory in purpose and terms, into a "taking" within the meaning of the Fifth Amendment.

(*c*) *Results.*—The positive accomplishments of L–208 further belie the contention that it was not an allocation order. As a result of L–208, a reservoir of used mining equipment and machinery estimated to exceed $75,000,000 in value was created (R. 1232). This material was "pitifully short of requirements" (R. 1777) and, as of November 19, 1942, when L–208 was first amended, this material was moving into channels leading to essential work at the rate of $82,600 per week. In April and May 1943 this transfer

of material accelerated to the rate of $100,000 per week (R. 1232). By May 24, 1943, WPB had issued 171 releases of equipment under L–208, releasing equipment with an estimated used value of $2,147,480.[42] Sixty-five releases were made to metallic mining operations, 17 to non-metallic mining operations, 26 to construction, 18 to the military, 20 to used equipment dealers for release to holders of serial numbers under Orders P–56, P–58, and P–73,[43] and 25 to "all others", principally agriculture (R. 1250).

This data was compiled at a time when many gold mines, including two of the present respondents, were still in operation (albeit curtailed) under the appeals provisions of L–208. While exact data on equipment releases subsequent to May 1943 is not available, if the $100,000 per week figure compiled on May 24, 1943 is projected over the balance of the life of the order, it is a fair approximation that equipment of over $12,000,000 in used value ultimately found its way from the nonessential gold mines into essential operations.

The diversion of used equipment to essential enterprises was of immediate and direct benefit to the war effort. And not only did this diversion serve to alleviate the shortage in such equipment by partially satisfying the requirements of essential industry, it correspondingly reduced the demand upon manufacturers for such machinery. The significance of this

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[42] These facts were brought to the attention of the WPB at its meeting of June 15, 1943, at which time the Board determined that L–208 should not be rescinded (R. 1605–1607).

[43] *Supra*, p. 11, n. 7.

factor to the war program is demonstrated by Dr. Wilbur Nelson's statement in March 1942 (R. 1183):

> * * * The makers of mining machinery have the finest machine shops in the United States, and every one of them has been in part, you might say, taken over by the Army and Navy. The capacity of every mining machinery plant in the United States is taken up in part in making munitions and machine tools or parts of machine tools.

The reduced demand effected by L–208 thus reduced the load upon manufacturers (R. 1610)[*] and in turn released machinery, manpower and material for other war purposes. And to these less direct beneficial achievements of L–208 may be added such incalculable accomplishments as the reduction in power consumption (R. 1610) and the easing of the burden on an

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[*] "A summary of the critical situation in mining machinery and equipment was given by A. I. Henderson on July 31, 1942. 'The mining machinery companies are already behind on deliveries. Shipments of mining equipment and supplies from certain of the largest mining machinery companies have declined as much as 35% in July below June shipments. Most of them have mining machinery orders booked for nine months or more in advance. This makes it imperative that these plants produce more machines and repair parts in the future than they are now making if mine production is to be maintained, much less increased.

"'Many makers of mining machinery operating under Processing Directive PRD 39 are fulfilling Army and Navy orders carrying AAA and AA–1 ratings on direct ordnance contracts calling for full production for several quarters ahead. These ratings are making it increasingly difficult and in many cases impossible to obtain materials and fabricating components from suppliers for mining equipment which the Mining Branch is directing them to produce in order to maintain mining production.' Memorandum, A. I. Henderson to J. A. Krug and C. H. Matthiessen, July 31, 1942." (R. 1197.)

overburdened transportation system which necessarily followed from the suspension of mining operations by over 150 nonessential gold mines.[45]

It is obvious that none of these accomplishments would have been possible under the limited restrictions in effect and applicable to nonessential gold mines prior to L–208 (R. 1505, 1595). The restrictions imposed on the gold mining industry by denying them serial numbers under Preference Order P–56 related to the acquisition of material for maintenance and operation. Operations were restricted only by the loss of manpower due to the Selective Service System and the migration of workers and the inability to acquire materials necessary to operation because of low priority ratings. Since respondents now claim that they could have operated indefinitely on their inventories, it is plain that the conservation of war material effected by L–208 would not have been possible under P–56 or other WPB orders. (R. 1505, 1595.)[46] And we take it that "to conserve" does not,

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[45] Neither the record nor the history of L–208 reflects data on the quantum or value of war material other than machinery and equipment which may have been channeled from idle inventories of L–208 mines into essential war enterprises. We think, however, that there can be little quarrel with Chief Judge Jones' dissenting statement that (R. 59): "If indeed these materials were critical, then it is natural to expect that, under the operation of supply and demand, such materials would find their way into essential uses. In fact it would have been wholly impracticable in a great national emergency for any agency of government to allocate and assign every bolt, nut, and piece of critical materials. * * *"

[46] See, *e. g.*, Homestakes "rough tabulation" of net operating requirements for 1942 (R. 1586, 1588), *supra*, p. 52, n. 33.

as the court below would have it, require that the material be put "to some more important use" (R. 33). The purpose of conservation, as is clear from the dictionary definition, [47] is to preserve, guard or protect, and this L–208 did with respect to respondent's material inventories. If the war proved of such duration that it was not necessary to requisition the idle inventories, that is all to the good but hardly a legitimate or appealing point of complaint.

Respondents, of course, belittle the constructive accomplishments of L–208 and emphasize that, as an instrument for diverting manpower to nonferrous metal mines, L–208 failed of its purpose. The gold mining industry as a whole, as could be expected, concurs in this view (R. 1547) as do the political representatives of gold mining states (R. 1524–1534). Aside from the irrelevancy of the criticism, the success or failure of L–208, as an instrument for the diversion of manpower, remains a debatable question, difficult to resolve because of the understandably inconclusive information available with respect to the post-L–208 migrations of gold mine workers. However this may be, it is safe to say that no one was more concerned than WPB with the effect of L–208 as a possible solution to the critical manpower problem which prevailed in the nonferrous metal mines and with the smelters and refiners of metals.

On November 5, 1942, the United States Employment Service, (USES), pursuant to a request of Donald M. Nelson, advised that, on the basis of Octo-

[47] Webster's *New International Dictionary (unabridged)*.

ber 30 reports from 40 USES local offices, 642 gold mine workers were known to have been released. Of these 642, 281 registered with the USES for new employment and 206 were placed, with 188 going to nonferrous metal mines (R. 1495). At Homestake Mining Company, as of October 21, 1942, 334 workers had been released, 309 of which were from its mining department. Other mines in the South Dakota area released 91 workers. Employment contracts were signed by 121 men, 81 with the Anaconda Copper Mining Company and 40 with the Climax Molybdenum Company (R. 1495–1496). This data was, of course, assembled before the 60 day cut-off date for operations under L–208 had expired.

On April 22, 1943, the Vice-Chairman of WPB was advised (R. 1503) that L–208 was responsible for the transfer of over 2,000 miners to war industries; 1,156 were placed in nonferrous mines, 515 in other essential industries, and 500 in other war industries and copper mines (R. 1504). As a result of labor transferred from gold mines, the Vice-Chairman was advised, 11,000 tons of copper, 4,000 tons of zinc, 2,400 tons of lead, 13,000 units of tungsten, and 6,000,000 pounds of molybdenum were added to the annual production of these metals (R. 1504).[48] On May 26, 1943, Mr. Knoizen, the Director, Mining Division, WPB, and Administrator of L–208, was advised (R. 1292) that of 3,217 employees displaced by L–208, 2,564 registered with the USES; of 1,571 referred to

[48] From a sample study of 1,000 gold miners displaced. Report of the Labor Production Division, WPB (R. 1504).

metal mines, 1,156 were placed; and of 894 referred to other industries, 515 were placed (R. 1299).

The accuracy of this data and the effectiveness of L–208 as a manpower measure were disputed, within the WPB, by Dr. Wilbur Nelson (1351–1358; 1504–1506) who, as we have pointed out, was convinced before it was issued that L–208 would be ineffective to divert manpower to essential mines (R. 1311, 1319). Dr. Nelson's disagreement with the statistical data (R. 1352–1358), furnished WPB by the USES and the War Manpower Commission (WMC), appears to have been based upon his own data compiled at an unspecified date by personal inquiries to a limited number of nonferrous metal mining companies (R. 1353). The disparity between Dr. Nelson's figures and those of WMC is further explained by the fact that his inquiries were apparently confined to "underground miners and muckers" (R. 1353) whereas the WMC figures relate to "gold miners" generally (R. 1228, 1229, 1353). The Court of Claims did not resolve this statistical conflict other than to state (R. 106) that "approximately 100 hardrock miners are known to have gone to work in the nonferrous metal mines and to have remained there for a year." If L–208 is to be judged by the number of gold miners transferred to essential mines and other enterprises, the court's finding, confined as it is to "hardrock miners" who remained in the nonferrous metal mines for a year, is arbitrary on its face (R. 994–995) and affords no sound basis for a conclusion as to the effectiveness of L–208 as a meas-

ure for diverting manpower to essential wartime enterprises.

But we think the controversy over the number of miners who may have migrated to essential mines and other wartime activities need not be resolved. No matter how much the WMC data may be discounted, or whether Dr. Nelson's figures are accepted, or whether the limited finding of the Court of Claims is accepted, the incontrovertible fact is that the manpower displaced by L–208 did not disappear from the face of the earth, but in part moved to essential nonferrous mines, as WPB hoped, and to essential enterprises (R. 1230–1231) just as WPB anticipated.[49] These facts, of course, belie any contention that L–208 was a total failure as a manpower measure and that WPB's expectation that partial relief to nonferrous mines would follow L–208 was unfounded. And, insofar as L–208 is to be judged by its contribution to the nation's war effort, it would seem immaterial whether manpower displaced by the order moved to nonferrous metal mines, to west

[49] By the war's end, manpower was generally accepted as the primary production problem. While the problem was the primary concern of the War Manpower Commission, it was of concern to the Army, the Navy and the WPB. Army and Navy procurement policies were revised so as to avoid placing contracts for production of items and use of materials in labor shortage areas whenever it was practicable to procure the needed items elsewhere. In 1944, WPB revised a number of limitation and conservation orders to include labor clauses, in effect, permitting production only if labor were available and if the production would in no way interfere with existing and potential war contracts. *Industrial Mobilization For War*, *op. cit.*, pp. 837–854.

coast aircraft plants,[50] shipyards and other war plants where the labor problem was as acute as in the nonferrous metal mines.

II

THERE WAS NO INTENTION, OR AUTHORITY, ON THE PART OF WPB TO TAKE RESPONDENTS' PROPERTY OR BUSINESS

It is clear from the evolution of Order L–208 that WPB never had any intention to "take" respondents' property or business for public use. See *supra*, pp. 29–40, and Appendix A, *infra*, pp. 73–110. WPB was acting solely under the allocation authority it possessed, by delegation from the President, under the Second War Powers Act. It was functioning solely in the field of regulation, not of eminent domain. The Court of Claims so recognized in its opinion on rehearing (R. 143).

Nor would WPB have had any authority to "take" respondents' right to mine gold. Section 9 of the Selective Service and Training Act of September 16, 1940, 54 Stat. 885, authorized only the placing of mandatory orders with firms "for such product or material as may be required, and which is of the na-

[50] In 1943, a critical shortage in manpower threatened aircraft production goals on the west coast and led to the inauguration of the "West Coast Manpower Program" by James F. Byrnes, Director of the Office of War Mobilization. This plan was a frontal attack upon the manpower problem on the west coast and included, *inter alia*, direction to cancel contracts on the west coast whenever a national program was to be reduced, shifting contracts to areas where the labor supply was more adequate, requiring sub-contracts to be placed outside critical labor areas, and curtailing less essential production in critical labor areas, including production of civilian goods and services. *Ibid.*, pp. 707–710.

ture and kind usually produced or capable of being produced by such" firm. The Act of October 10, 1940, 54 Stat. 1090, authorized the requisition of "military or naval equipment or munitions, or component parts thereof, or machinery, tools or materials, or supplies necessary for the manufacture, servicing, or operation thereof * * *" held for export. And the Act of October 16, 1941, 55 Stat. 742, authorized the requisition of military or naval equipment, supplies, or munitions, or component parts thereof, etc., when needed for the defense of the United States, when such need "is immediate and impending and such as will not admit of delay or resort to any other source of supply" and when all other means of obtaining the property upon fair and reasonable terms have been exhausted. Broad though this authority was, it is apparent that the particular property that respondents claim has been taken—*viz.*, the right to mine gold—does not fall within the terms of these acts. In absence of the legal authority to take or requisition, it is clear that the Government may not be held liable if a taking occurs. *United States* v. *Goltra*, 312 U. S. 203; *United States* v. *North American Co.*, 253 U. S. 330; *Hooe* v. *United States*, 218 U. S. 322; cf. *Mitchell* v. *Harmony*, 13 How. 115; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579.

The Court of Claims attempted to by-pass this established principle by holding that the WPB had merely used "an *unauthorized* means of accomplishing an *authorized* taking" (emphasis in original) (R. 146). But, as we have just pointed out, WPB—the agency which issued Order L-208—had not been given

any power at all to take this kind of property. There could be no *authorized* taking by WPB, whatever means it sought to use. Unless the principle that the Government may not be held responsible in damages for an unauthorized taking is to be jettisoned (and the Court of Claims did not purport to abandon it), there must be, at the least, some authority in the agency to seize or requisition the particular property. The authority to requisition or condemn property has been granted only with great care and its use has been carefully controlled to prevent abuse. The ruling of the court below runs directly counter to these established principles.[51]

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[51] The Court of Claims relies on *Hatahley* v. *United States*, 351 U. S. 173 (R. 146), but that decision has no bearing on the present problem. That case arose under the Federal Tort Claims Act, which imposes liability upon the Government for the torts of its employees "while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act * * * occurred." 28 U. S. C. 1346 (b). The Court held the Government liable since "[u]nder the law of Utah, an employer is liable to third persons for the willful torts of his employees if the acts are committed in furtherance of the employer's interests or if the use of force could have been contemplated in the employment." 351 U. S. at 180. In contrast to this principle, which is generally applied in tort law and is necessary if the doctrine of *respondeat superior* is to be effective, no such rule has ever been followed in the field of eminent domain. On the contrary, the Government has been held liable only for those takings for which the requisite general authority has been granted. See the cases cited, *supra*, p. 70.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the Court of Claims should be reversed with directions to dismiss respondents' petitions in that court.

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APPENDIX A

History and Background of Limitation Order L–208

A. *The War Production Board—Its Creation, Powers, and Procedures.*—(1) The military peril with which the United States was confronted in late 1941 and in the early months of 1942 has not yet receded into history. The existence of the United States as a sovereign nation was in jeopardy. The devastating attack upon Pearl Harbor on December 7, 1941 was followed in quick succession by a series of allied military reverses marked by the Japanese conquest of the Philippines, the Dutch East Indies, Java, Singapore and a host of island outposts in the South Pacific. The threat of actual invasion of the west coast of the United States was real. To the east, at the same time, most of Europe was under Axis domination. In January 1942, the British advance along the Mediterranean coast was in check and the long retreat of the British Army to Egypt began. Moscow was under siege and the Battle of the Atlantic was only in its beginning.

Such was the critical world situation when on January 6, 1942, the President called for the total mobilization of every American resource and outlined a production program in terms of airplanes, tanks, guns and ships [1] with which the enemy might be repulsed

[1] The production program was, in part:

1. To increase our production rate of airplanes so rapidly that in this year, 1942, we shall produce 60,000 planes, 10,000 more than the goal set a year and a half ago. This

and swiftly and overwhelmingly defeated. The immensity of the task which lay ahead and the measures required for its fulfillment were fully realized. In the President's words:

> Our task is hard—our task is unprecedented—and the time is short. We must strain every existing armament-producing facility to the utmost. We must convert every available plant and tool to war production. That goes all the way from the greatest plants to the smallest—from the huge automobile industry to the village machine shop.
>
> Production for war is based on men and women—the human hands and brains which collectively we call labor.
>
> * * * * *
>
> Production for war is based on metals and raw materials—steel, copper, rubber, aluminum, zinc, tin. Greater and greater quantities of them will have to be diverted to war purposes. Civilian use of them will have to be

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includes 45,000 combat planes—bombers, dive bombers, pursuit planes. The rate of increase will be continued, so that next year, 1943, we shall produce 125,000 airplanes, including 100,000 combat planes.

2. To increase our production rate of tanks so rapidly that in this year, 1942, we shall produce 45,000 tanks; and to continue that increase so that next year, 1943, we shall produce 75,000 tanks.

3. To increase our production rate of antiaircraft guns so rapidly that in this year, 1942, we shall produce 20,000 of them; and to continue that increase so that next year, 1943, we shall produce 35,000 antiaircraft guns.

4. To increase our production rate of merchant ships so rapidly that in this year, 1942, we shall build 8,000,000 deadweight tons as compared with a 1941 production of 1,100,000. We shall continue that increase so that next year, 1943, we shall build 10,000,000 tons. 88 Cong. Rec. 32, 34.

> cut further and still further—and, in many cases, completely eliminated.
>
> War costs money. * * * It means cutting luxuries and other nonessentials. In a word, it means an all-out war by individual effort and family effort in a united country.[2]

The task of converting, mobilizing and directing the entire economy to meet the astronomical production demands of total war and the civilian economy fell, primarily, to the War Production Board. Created by Executive Order on January 16, 1942,[3] the Board was originally composed of a Chairman, Donald M. Nelson, Secretary of War Stimson, Secretary of Navy Knox, Federal Loan Administrator Jesse Jones, the Director General and the Associate Director General of the Office of Production Management, William S. Knudsen and Sidney Hillman, respectively, the Administrator of the Office of Price Administration (Leon Henderson), the Chairman of the Board of Economic Warfare (Vice President Wallace), and Special Assistant to the President, Harry L. Hopkins. By the terms of Executive Order 9024, the Chairman, with the advice and assistance of Board members, was charged with the general direction over the war procurement and production program and was directed to:

> Determine the policies, plans, procedures, and methods of the several Federal departments, establishments, and agencies in respect to war procurement and production, including purchasing, contracting, specifications, and construction; and including conversion, requisitioning, plant expansion, and the financing thereof; and issue such directives in respect

[2] Message on the State of the Union, January 6, 1942, 88 Cong. Rec. 32, 33–34.

[3] Executive Order No. 9024 (7 Fed. Reg. 329).

thereto as he may deem necessary or appropriate.[4]

By Executive Order No. 9024 and a series of subsequent Orders,[5] the Board, in April 1942, became the super-governmental agency responsible for industrial mobilization and production and for this purpose, by direct delegation and by succession to the functions and powers of predecessor defense agencies, the Board was ultimately vested with the full wartime statutory powers of the President with respect to production.

Principal among the Board's delegated power was the power granted the President by Section 2 (a) of the Act of June 28, 1940, 54 Stat. 676, which, as amended on May 31, 1941, 55 Stat. 236, and as amended and incorporated in Section 301 of the Second War Powers Act (56 Stat. 176, 177; 50 U. S. C. App. (1946 ed.) 633) provided, in material part, as follows:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem

[4] *Ibid.*

[5] By Executive Order No. 9024, the Board succeeded to the functions and powers vested in the Supply Priorities and Allocation Board by Executive Order 8875, August 28, 1941 (6 Fed. Reg. 4483). Executive Order No. 9040, January 24, 1942 (7 Fed. Reg. 527), abolished the SPAB and the Office of Production Management, established by Executive Order No. 8629, January 7, 1941 (6 Fed. Reg. 191). By Executive Order No. 9040, *supra*, the functions and powers of OPM, as derived from Executive Orders No. 8629, *supra*, and No. 8875, *supra*, were transferred to the Board. By Executive Order 9125, April 7, 1942 (7 Fed. Reg. 2719) the WPB was delegated the powers conferred upon the President by Title III of the Second War Powers Act, *supra*, p. 3.

necessary or appropriate in the public interest and to promote the national defense.

It was through this grant of authority, together with the authority to assign priority to deliveries of material for military contracts,[6] that substantially all controls and restrictions upon industry were imposed prior to and throughout World War II. And it was pursuant to this authority that, between December 7, 1941 and August 13, 1945, when victory on all fronts was finally achieved, every segment of the industrial economy was regulated "on a scale and of an intensity unprecedented in the annals of our nation."[7]

(2) While the regulation of industry by the Board assumed a variety of forms, it was largely through a series of "P", "M" and "L" orders that industry was mobilized and all the resources necessary for war and essential to the civilian economy were produced, processed, allocated, conserved, fabricated and manufactured.

The "P" (preference) orders, first in point of time, were generally addressed to buyers of materials and had the effect of authorizing the holder to attach to a purchase order a letter or symbol entitling that order to preference in delivery (R. 63). The "P" orders were originated by the OPM in the pre-Pearl Harbor preparedness period and under these orders preference ratings ranging from A–1 to A–10 were assigned (R. 64). These "A" ratings generally reflected the relative importance of a buyer's product to the defense and war program or to the civilian economy.

"M" orders made their appearance in the fall of 1941, following the Act of May 31, 1941, 55 Stat. 236.

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[6] Section 2 (a) of the Act of June 28, 1940, 54 Stat. 676.

[7] O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. L. Rev. 1, 4.

which gave the President authority to allocate materials. "M" orders were usually directed to the manufacturers or distributors of particular materials. These orders served several ends: They frequently prohibited a producer from selling to a buyer unless the buyer had some preference rating (R. 63) or prohibited a producer from delivering a particular material except upon specific authorization from the OPM, before its abolition, and WPB thereafter (R. 311). In addition, "M" orders were employed to prohibit the use of particular materials in designated end or component products. The aluminum order of August 18, 1942 (M–1–i, 7 Fed. Reg. 6519), for example, prohibited the use of aluminum except in specified items. And the copper order of October 21, 1941 (M–9–c, 6 Fed. Reg. 5394) prohibited the use of copper in a long list of materials and products.

"L" orders, generally, were used to limit, curtail or prohibit the manufacture or production of end-products containing critical material (R. 63), or requiring the use of facilities or equipment adaptable to war production. Through these orders, demand for critical materials was reduced, materials were conserved, and plant facilities, equipment, and manpower became available for war production purposes. Illustrative "L" orders are L–6 as amended October 13, 1943 (8 Fed Reg. 14003), prohibiting the production of domestic laundry equipment; L–2–g (7 Fed. Reg. 473), issued January 21, 1942, prohibiting, after February 1, 1942, producers of passenger automobiles from manufacturing passenger cars for civilian or military use; L–52 (7 Fed. Reg. 5509), issued July 17, 1942, prohibiting, after September 1, 1942, bicycle manufacturers from processing, fabricating or assembling any material for use in the production of bicycles and prohibiting the manufacture or assembling of bicycles

after that date; L–18–b (7 Fed. Reg. 2462), issued March 30, 1942, prohibiting the manufacture or production of domestic vacuum cleaners after April 30, 1942; L–5–c (7 Fed. Reg. 1493), prohibiting, after April 30, 1942, the production of domestic mechanical refrigerators; and, of course, L–208 (R. 102–105), issued October 8, 1942, which prohibited gold production by mines within the terms of the order.

B. *Regulations Adversely Affecting the Gold Mining Industry Prior to Limitation Order L–208.*—As early as May 1941, requirements for strategic and critical metals and the machinery to produce these metals began to outdistance supply and productive capacity. Shortages of both raw materials and facilities threatened to hold production under the level required for our own expanding military needs and the imperative lend-lease requirements of the Allies. In recognition of the priority requirements of the mining machinery and equipment industry, on July 29, 1941, OPM issued Preference Rating Order P–23. This order permitted producers of mining machinery and equipment to use a preference rating of A–3 for the acquisition of materials to be used in the manufacture of mining machinery and equipment (R. 1250–1254).

By September 1941, the necessity for assuring the availability of maintenance and repair equipment and operating supplies for the nation's mines was also apparent. On September 17, OPM issued Preference Rating Order P–56 (R. 1255–1260).[8] This or-

[8] On September 9, 1941, OPM had issued Preference Rating Order P–22, known as the General Repair Order (R. 1364–1369). It authorized a broad variety of industries, including mines and quarries, to use an A–10 rating for the acquisition of material needed for the repair of their property or equipment.

der covered approximately 15,000 mines and was intended to facilitate the uninterrupted flow of equipment and material to mines whose production was essential to the defense effort. Under this order, a mine operator whose operations were "important from the standpoint of defense or essential civilian needs" (R. 1167) was granted a serial number and could then apply for a priority rating under the order. In order to minimize the delay in the resumption of production, a priority rating of A–1–a was assigned to deliveries of repair material to a mine in the event of an actual breakdown. Mine supplies and repair parts in general were assigned an A–8 rating.

Gold placer mines were expressly excepted from the priority benefits of Order P–56[9] (R. 1278, 1430), thus marking the first instance in which gold mining as opposed to other mining enterprises received special treatment.[10] The exceptive treatment of gold placer

[9] Gold placer mining consists of the derivation of gold from gravels or other stream-borne material that have been displaced or carried away from the original ore bodies. The principal type of modern placer operations consists in the handling of these gravels by connected-bucket floating dredges. Other methods of placer mining include operation of dragline and power-shovel excavators in connection with dry-land and hand washing, hydraulicing, drift mining (in frozen ground or ancient buried river channels), sluicing and rocking (R. 1282, 1284).

Lode mining is the underground working of auriferous quartz veins in hard rock (R. 65; *Minerals Yearbook*, 1941, United States Bureau of Mines, pp. 69–77).

[10] Out of a total of 7,891 gold and silver producing mines in United States and Alaska in 1941, 3,349 were placer operations. In Alaska alone, out of a total of 855 gold and silver producing mines, 799 were placer operations. *Minerals Yearbook*, 1941, United States Bureau of Mines, p. 67. The number of placer operations declined from a total of 3,349 in 1941 to 1,758 in 1942. *Minerals Yearbook*, 1942, United States Bureau of Mines, p. 95.

operations was justified by Dr. Wilbur A. Nelson, the administrator of Order P–56, on the ground that "we felt that we must start restricting mining activities where they were not essential to the production of materials needed in a defense effort" (R. 1168). This comment was a reference to the fact that placer mines produced only gold while many lode mines produced other metals. A further reason for exclusion of the placer gold mines was that placer operations could be discontinued without deterioration of equipment. In contrast, as stated by Donald Nelson, then Director of the Supply Priorities and Allocation Board (R. 65–66):

> * * * Most lode mines are underground, and consequently subject to the hazards of rapid depreciation if they are shut down. Flooding by water is the chief hazard. Though not all lode-mining is deep enough to suffer seriously if a shutdown occurs, continuity of operation is clearly desirable to prevent depreciation of installed equipment and structures. On the other hand, placer operations can be discontinued (and often are, seasonally) without injury to equipment * * *

Because of the similarity of most metal mining operations in the underground drilling and blasting, in the loading and transporting, and in the crushing and elevation of ores, the same industrial concerns that supplied machinery and equipment to the essential nonferrous metal mines also supplied the nonessential gold mines (R. 1283). In the fall of 1941, the shortage of critical mining material and supplies continued to become increasingly acute. Since the gold mining industry was consuming critical materials and utilizing mining equipment in short supply, an overall governmental policy determination with respect to gold mining was recognized as necessary and was the subject

of active consideration by the SPAB and at Cabinet level (R. 69–71).

In a memorandum submitted to SPAB on November 18, 1941, Donald A. Nelson reviewed the problems relating to furnishing mining materials both to gold mines in the United States and to gold mines in foreign countries, principally Canada and South Africa. In his report to SPAB, Mr. Nelson pointed to the necessity of obtaining a formal opinion from the Treasury Department on the importance of gold production to monetary policy. In this respect, he said (R. 66):

> * * * It is to be emphasized that from a consumption of scarce materials standpoint, this whole issue is a minor one. Only about $7,000,000 of equipment, not including a lesser amount for repairs and maintenance, is involved annually at a maximum. Such importance as the issue possesses is largely political. It is political from two opposing standpoints—that of popular reaction to the continuation of an industry widely regarded as unnecessary (to the point of jocularity), and contrariwise, that of the regional interests delineated in the report.

Mr. Nelson posed several alternative methods of varying stringency for dealing with the material and equipment requirements of domestic mines and suggested that all foreign mine needs be reviewed continuously with the Economic Defense Board so that consideration of inter-American and British American policy could be consistently applied to decisions authorizing or forbidding shipments of gold-mining machinery and repair parts to foreign countries (R. 67).

On November 24, 1941, a meeting concerned with priorities and export licenses for gold mining machinery was called by A. A. Berle, Jr., then Assistant

Secretary of State. This meeting was attended by representatives of the Treasury Department, the Federal Reserve Board, and OPM, as well as the State Department. The consensus of opinion at this meeting, as reported (R. 68–69), was that:

> * * * preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output and to refusing equipment for any expansion of output; subject to exceptions in cases where extraordinary hardship might result—as in the case of isolated communities having no alternative forms of employment—preference ratings for exports of gold mining equipment should be made to depend on a showing that the maintenance of the present level of gold production is necessary (*a*) to supply dollars for an otherwise deficit dollar position in the balance of payments of the country (or in the case of South Africa, for the dollar position of the sterling area), or (*b*) for special political reasons; whenever the current gold mining is maintained mainly to prevent a dollar deficit and especially where the labor could be used for more direct contribution to defense production, this Government should endeavor to find other means of meeting this deficit such as lend-lease activities, purchase of gold "in the ground" for postwar delivery, and the like. To give effect to the foregoing conclusions, no general priority ratings for gold mining equipment, including repair and replacement parts, should be granted but individual consideration should be given to each application on its merits unless adequate periodic compliance investigations can be made (particularly in Canada) as is done in the United States.

On December 2, 1941, SPAB directed Mr. Nelson to obtain the official opinions of the State Department,

Treasury Department, Federal Reserve Board and the Board of Economic Warfare on "supplying gold mining equipment abroad and on other possibilities of providing dollars to offset probable dollar deficit positions" (R. 69). In response to Mr. Nelson's request, the Secretary of Treasury stated, in part, as follows (R. 69):

> * * * Domestic gold production in wartime serves no military purpose, but does consume labor and materials that have usefulness in military production, particularly in the mining of scarce metals. We do not believe, therefore, that domestic gold mines should receive any preference rating for machinery unless the gold is produced with a substantial amount of much needed by-product metals or ores, or unless it is produced in a mine so peculiarly situated that serious and sustained unemployment of men not eligible for defense jobs would result from its shutdown.

The Secretary of State's reply was confined to the question of supplying gold mining equipment abroad. It stated, in pertinent part, as follows (R. 69):

> It is the Department's opinion that preference ratings for gold mining equipment should be granted only after careful scrutiny with a view to maintaining, at the very most, existing rates of output, and to refusing equipment for any expansion of output. * * *

The Chairman of the Board of Governors of the Federal Reserve System stated, in part, that:

> Priority measures tending to reduce new gold production under present circumstances are, in my judgment, highly desirable. The United States stock of gold is already redundant. Its dollar value is more than five times as great as in the 1920's. From the standpoint of credit control in this country further additions to gold

stock are not only unnecessary; they are harmful. By swelling excess bank reserves, they add to inflationary dangers and make the maintenance of a stable and productive economy more difficult. From the standpoint of war output of the allied countries, the materials, machinery, and labor devoted to gold production are largely wasted.

* * * * *

Since new gold output is largely unnecessary and diverts materials, machinery, and labor from production of war supplies, I strongly favor curtailing it so far as is practicable through the priorities system. I would suggest that no machinery be allowed to foreign mines for the expansion of gold output; and that machinery and supplies for the maintenance and repair of gold mines should be restricted to the minimum consonant with the principles adopted by the Supply Priorities and Allocation Board for other nondefense industries (R. 70).

Based upon these reports, it "was the judgment of the [SPAB] that in view of the military program only limited priorities and export licenses should be granted to the gold mining industry" and it was agreed "that in granting priorities and export licenses for gold mining machinery, materials should not be allowed for expansion of production although minimum amounts for maintenance and repair may be provided" (R. 72). This policy-determination by SPAB was reflected in Preference Rating Order P–100 (R. 1369), issued by OPM on December 18, 1941, and Preference Rating P–56–a (R. 1260), issued on December 31, 1941. P–100 revoked Preference Rating Order P–22 (R. 1364) (the General Repair Order). Thereafter, industries within the terms of P–100, including gold mines, were entitled only to an A–10 priority rating for their maintenance, repair and

operating supplies. The A–10 rating was the lowest preference rating used (R. 73). P–56–a superseded P–23 (*supra*, p. 79) and continued to authorize the manufacturers of mining machinery to use an A–3 priority rating to acquire material entering into the production of machinery and equipment ordinarily used in the mining industry, including the gold-mining industry (R. 73).

C. *The Evolution of Limitation Order L–208.*—(1) After Pearl Harbor and the declaration of war by the United States against the Axis, the whole metals and mining machinery problem became acute. Sources of large supplies of alloying materials, especially chrome and manganese, were cut off by enemy action at a time when demands for steel, copper, zinc and lead for war production were soaring. An all-out expansion of domestic production of these metals in the early months of 1942 came at a time when the metals and fabricating equipment necessary to produce mining machinery were at a premium and used mining equipment was pitifully short of requirements (R. 1177). In these critical circumstances, the further restriction of the gold mining industry, because of nonessentiality to the war program, was an increasingly prominent subject of discussion by those responsible for the war production program.

On January 20, 1942, Wilbur Nelson, by then Administrator of the Mining Branch of WPB, requested authority from the Chairman of the Board to make final decisions in the sale of mining machinery for use both in domestic and foreign mines. He said:

> * * * We must have this power if we are to divert the limited supply of mining machinery into the most important channels, both domestic and foreign. There are other types of min-

ing besides gold which may also have to be given harsh treatment in future months (R. 1178).

By letter of February 11, 1942, to the Chairman of the WPB, E. R. Stettinius, Jr., Administrator of the Office of Lend-Lease Administration, wrote, in part, as follows (R. 1179):

> Originally the British asked us for 100,000 tons of steel to increase their South African gold production. Naturally, in view of the steel and shipping shortage here, we turned them down. However, one of the most acute shortages in this country is nitroglycerin which is used extensively in gold mining. In addition, gold mining requires large amounts of hardened steel and the use of a considerable body of capable mining labor which might well be used in other fields.
>
> In order to divert this extremely valuable stockpile of men and material we would like to suggest that both nitro-glycerin and hardened steel be denied the gold mining companies for the duration of the war. If we could set this example in the United States it might be possible to speed up the whole British war effort by getting the British to concentrate on the production of war materials rather than on the production of dollars as exemplified by their request for 100,000 tons of steel for gold mining in South Africa.
>
> In order to allay their fears of a shortage of dollars for exchange it might be possible to make them a loan based on future gold production, or better still, to buy their normal production for the next two years in the ground, said production to be delivered to us when the war is over. The important thing is to put to war uses the men and labor supply that are now being consumed in gold mining.

In reply to this letter, Donald Nelson stated, in part, as follows (R. 1179–1180):

> * * * The decision on the large volume of requests for material and equipment on the part of South African gold mine operators will have important economic and political implications. Under these circumstances and in view of several communications received from General Smuts in the last few months, the Board of Economic Warfare is now in the process of preparing an agenda of specific subjects to be investigated by a commission which it is contemplated will be sent to South Africa and which General Smuts has indicated would be most welcome. I understand that one of the principal subjects for investigation will comprise the possibilities and requirements for the development and operation of mines both in the Union itself and in Rhodesia for the production of copper, chrome, asbestos, manganese and other available materials required for the war effort.
>
> Pending a final decision on a general policy, together with the receipt of further information from the South African gold mines concerning the circumstances surrounding their requirements, little or no equipment or materials including nitro-glycerin are being exported to South African or other foreign mines.

On February 18, 1942, John P. Gregg, Assistant Chief of the Bureau of Priorities, proposed to C. H. Matthiessen, Jr., Chief of the Bureau, that gold and silver mines be closed forthwith in order to conserve materials. The letter stated in pertinent part (R. 1181):

> The Committee is of the view that the restrictions with respect to materials to be used in the mining of gold and silver are not sufficiently restrictive and that a limitation order

> should be drafted forthwith to stop production of gold and silver in the United States, appropriate consideration being given to the continuance of such production in Canada, Mexico, South Africa, and other areas now permitted to obtain materials and equipment from this country under Lend-Lease or direct purchase.

The proposed closing of the gold mines was rejected. Instead, on March 2, 1942, WPB amended Preference Rating Order P–56 which had the effect of uprating the priorities on mining machinery for essential mines and depriving mines of all preference ratings whose production, in dollar value, consisted of more than 30 per cent gold and/or silver (R. 1181–82; 1268).

The "30 percent exclusion clause", in amended P–56, resulted in the revocation of 373 P–56 serial numbers held by mines producing gold. Although, in practice, serial numbers were eventually restored to mines whose production included significant quantities of materials important to national defense, over 200 mines, including respondents' mines, never again received serial numbers under P–56 (R. 74). These mines thus were reduced to the same priority position as the least essential industries. They were precluded from obtaining any critical materials which might be needed by a nonferrous metal mine essential to the war effort. While it was possible for gold mines excluded from the benefits of P–56 to apply for equipment and repair parts under the general repair order P–100 with an A–10 rating,[11]

[11] Preference Rating Order P–100 was revoked on April 2, 1943 (8 Fed. Reg. 4242). The A–10 priority rating for nonessential gold mines was, however, in effect, continued under Controlled Materials Plan Regulation 5, issued February 9, 1943 (8 Fed. Reg. 1793).

the demand for such material was so far above available supply that the possibility of gold mines obtaining material was remote. Thus, by March 2, 1942, a series of progressively more stringent priority regulations had succeeded in virtually eliminating the potential acquisition by the gold mines of critical materials, supplies and equipment necessary to maintenance and operation (R. 75).

The "30 percent exclusion clause" evoked a wave of protest from mining districts, and public meetings in protest against the clause were held in Reno and Denver. These meetings were attended by the Governors of five mining states, Congressional representatives, and Wilbur Nelson of the WPB. At the Nevada meeting, Nelson explained the WPB policy with respect to gold and silver mines and, in part, said as follows:

> I know you are all wondering why all of the mines cannot have what they need. The answer is the mining machinery situation. The makers of mining machinery have the finest machine shops in the United States, and everyone of them has been in part, you might say, taken over by the Army and Navy. The capacity of every mining machinery plant in the United States is taken up in part in making munitions and machine tools or parts of machine tools (R. 1183).

The exclusion clause in P–56 was the subject of extensive hearings by a Subcommittee of the Special Committee on the Investigation of Silver in May 1942. (R. 1184). On May 15, 1942, WPB amended P–56 so as to eliminate the exclusion clause (R. 1278). However, this amendment effected no practical change since the ratings assigned by P–56 could be used only if WPB granted a serial number and after March 2, 1942, serial numbers were not granted or restored to

gold and silver mines not producing substantial quantities of critical materials (R. 1188).

The predicate for restrictive treatment by the OPM and WPB of the gold mines was, of course, that with a gold reserve of $22,737,000,000 at the end of 1941,[12] gold was of no importance to the United States as a monetary standard (R. 1090, 1285) [13] and, as a commodity, had no significant role to play in the war production program.[14] In contrast to the nonessential character of gold, all agencies of the Government were in agreement that the success of the country's armament program was basically dependent on the increased production of basic raw materials such as copper, lead, zinc, and other nonferrous metals. As of May 1942, the progressively stringent restrictions upon the gold mining industry had been necessary because of the increasingly acute shortage of nonferrous metals, a shortage of mining equipment and machinery, and a shortage of equipment and materials used to manufacture equipment and machinery. In the spring and summer of 1942, an additional problem became apparent which, together with these factors, brought about the complete curtailment of operations in gold mines not producing substantial quantities of strategic materials.

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[12] *Minerals Yearbook*, 1942, United States Bureau of Mines, p. 80.

[13] In contrast to the nonessentiality of gold production to the economy of the United States, the economy of South Africa was based almost exclusively upon gold production and, in both Canada and South Africa, gold was essential to supply dollars for an otherwise deficit dollar position and to sustain the dollar position of the sterling area (R. 1170–71, 1173, 1174, 1175).

[14] As to the limited industrial use of gold, see *Minerals Yearbook*, 1942, United States Bureau of Mines, p. 88.

(2) By July 1942, the Labor Division of the War Production Board, the War Department, and the War Manpower Commission were all concerned that the production of nonferrous metals in the United States, particularly copper, would not be adequate to meet current and anticipated demands for war production (R. 1191–1193). The conditions contributing to unsatisfactory production records in the nonferrous mines were (1) the migration of workers from nonferrous mines to other war industries offering higher wages and better working conditions; (2) the drafting of workers for the armed services; (3) excessive labor turnover; (4) low morale of the workers; (5) the short workweek in the mines; and (6) the lack of organized and effective program of recruitment of workers for mining industry (R. 75).

To remedy these conditions, the War Department submitted a report on July 8, 1942, recommending that the War Manpower Commission formulate a program for the recruitment of mine labor and suggested "a program for the orderly transfer of workers in gold mines and other nonessential industries to the nonferrous mines" (R. 76), as well as assistance in securing Selective Service deferments for mining occupations. To the WPB, the War Department recommended a Labor-Management Production Drive Committee to secure increased production through improved morale and greater efficiency; the report then recommended that:

> Production of gold, with the exception of required amounts of essential silicious gold ores, should be curtailed by an order of the War Production Board to free labor which is urgently needed in the nonferrous mines which are essential to the war effort. * * * [R. 76].

The report also recommended that the War Labor Board give careful consideration to the wage dif-

ferential problem in cases before it involving about one-half of the copper mining industry. The recommendations for the Army and Navy were that they were to establish morale building programs for the miners and that they exert influence on Army-Navy contractors to prevent the further recruitment of labor from the nonferrous mines (R. 76).

The manpower shortage was also a subject of independent study and recommendation by the Labor Production Division of WPB. In a memorandum to the Director of Operations of the War Manpower Commission on July 4, 1942 (R. 76–77), it was observed that the 15 largest producers of gold in 7 Western States had some 6,700 employees; that the gold mines of these producers were sometimes located in the vicinity of nonferrous metal mines; and that in some cases one company would own both a gold mine and a nonferrous metal mine in the same area.[15] The memorandum concluded as follows:

> Steps should be taken to remedy the critical labor situation in nonferrous metal mining, including arrangements for the transfer of miners from gold and silver mining to copper, lead, zinc, tungsten, chrome, and molybdenum mining. This can be done through curtailment of gold and silver production, but it would be necessary to make sure that the workers released went into nonferrous metal mining and did not go into war plants in the vicinity or on the West Coast. It has been customary for

[15] The 6,700 figure appearing in the memorandum represented employees of all kinds and no figure was given as to the number of hard-rock miners—the type of employees most needed in the nonferrous metal mines. The statistics quoted in the memorandum were based on the year 1941 and were later found not to represent the situation in the summer of 1942 because the gold mines as well as the nonferrous metal mines had been losing workers to the war industries and to the draft.

metal miners in the mountain states to move considerable distances with the opening and closing of mines and ordinary turnover (R. 77–78).

On July 9, 1942, the General Counsel of the War Manpower Commission sent to a member of his staff a memorandum concerning the possibility of transferring gold miners to nonferrous mines. The memorandum stated (R. 78):

> At a meeting of the War Manpower Commission yesterday, the following problem was referred to this office.
>
> General McSherry [Director of Operations of WMC] wishes to secure the release of men employed in the gold mining industry for transfer to the copper mining industry. Concededly the War Manpower Commission cannot accomplish this result directly. May the result be accomplished (1) by the War Production Board refusing to the gold mine operators critical materials used in their operations thus compelling the closing of the mines; (2) may the Chairman of the War Manpower Commission direct the War Production Board to take that action?
>
> The specific situation suggested is simply illustrative of the general problem in this field.

By August 1942, the proposed curtailment of nonessential gold mines was gaining momentum, although the proposal was not without opposition. The Chief of the Mining Branch, WPB, Wilbur Nelson, expressed his opposition to the proposal for the reason that gold and silver miners were the last reservoir of skilled mining labor. It was his fear that such miners could not be effectively diverted from the gold mines into the critical nonferrous metal mines (R. 78–79).

Later in August, the General Manager of the Homestake Mining Company conferred with several

officials of the WPB and expressed his opposition to the closing of the mines, basically for the same reason as that given by Wilbur Nelson. Senator McCarran, similarly, in a letter to Donald Nelson, set forth his reasons why the curtailment of gold mining operations would not be effective for the purpose of obtaining any considerable number of miners for the nonferrous mines (R. 80).

The minutes of the meeting of the War Production Board held September 1, 1942 (R. 81–84), reveal that the labor supply problem for copper, lead, and zinc industries was the subject of extensive consideration and discussion by the Board. The minutes reflect that (R. 81–82):

> Mr. King [Chief, Copper Branch, WPB] reported that 6,000 miners have been lost by the copper, lead, and zinc mines to other industries during the past several months and that the shortage of labor will become increasingly acute next year when new facilities will require 2,000 additional miners. Preliminary reports indicate a shortage of 2,100 workers in smelters and refineries. Mr. King pointed out that the loss of 5 or 6 thousand workers at the copper mines might so influence the subsequent fabricating processes that 100 thousand workers in war plants at the end product state would be affected. Although monthly production of copper increased steadily from early 1941 to a peak of 95,000 tons in May and June 1942, output in July dropped 5,000 tons to 90,000. The copper outlook is even more critical than shown by the drop in production, since at many mines labor is being transferred from developmental and stripping operations, necessary to provide for future production, to current ore extraction. The position of the smelters and refineries is exemplified by a smelter at Tacoma where output of 2,000 tons

of copper per month is being lost for lack of only 300 unskilled common laborers. Mr. King emphasized that production at the mines, smelters and refineries will continue to fall unless the exodus of labor is checked and the supply of workers augmented. Output of lead and zinc likewise declined in July, and the labor-production situation in these metals is similar to that in the copper industry.

The steps which had been taken or were under consideration to remedy the labor problem in nonferrous mines were detailed (R. 82–83):

Mr. King reported that following a resolution of the War Production Board (See WPB Minutes, March 3, 1942, Item 7), labor-management committees were established in the metal mining areas and the importance of having mine workers stay at their jobs was publicized. On June 13, 1942 the Chairman of the War Production Board formally launched the War Production Drive in the nonferrous metals industries by a radio address to the miners at Butte, Montana.

As further steps in halting out-migration, the Inter-Departmental Committee on Nonferrous Metals was established on August 11 and various letters and literature had been prepared for distribution to mine operators and labor unions; an order has been prepared to prohibit the use of materials in nonessential gold mines, which may free about 8,000 workers; plans to prevent employment of miners on Army and Navy construction projects are being considered; and training programs are being introduced into mining properties. To increase the efficiency of present working forces, mine equipment is being accorded high priority ratings, and labor is being trained and upgraded by improving working and living conditions, and by lowering age and other restrictions on hiring. Mr. Lund observed that in many cases

labor standards have shown no change from those existing in normal times when a surplus of labor is available. He suggested that the pooled employment interviews which the War Manpower Commission is now conducting in some parts of the country should be pursued with increasing vigor.

Mr. Lubin [acting for Harry L. Hopkins] inquired if the order to prohibit the use of materials in nonessential gold mines had actually been issued and, if not, what steps are being taken toward its issuance. Mr. King, replied that a first problem is to define a nonessential gold mine since gold is frequently found in association with other metals and it is necessary to avoid denying materials to mines that produce important quantities of critical metals jointly with gold. It is hoped that an appropriate definition can be developed very shortly and an order issued promptly thereafter.

After further discussion, the Board agreed that (R. 84):

Inadequate production of copper, lead, and zinc will result inevitably in reduced output of munitions, including small arms ammunition needed by the fighting forces. The output of these metals is now being reduced by a shortage of manpower in mines, smelters and refineries.

The War Production Board is charged with the primary responsibility for providing the maximum possible production of critical metals, but the solution of the problem of assuring a sufficient supply of labor involves the responsibilities of other agencies of the Government as well. The coordination of the efforts and activities of other agencies of the Government with those of the War Production Board is needed; therefore, to ensure an adequate supply of critical metals.

The War Production Board urges all agencies involved to promote and support such ac-

> tions as may be necessary to provide to nonferrous mines, smelters, and refineries a supply of labor adequate for the maximum possible output of such metals. It is especially important that the facilities of the United States Employment Service be expanded and strengthened to meet this particular need.

The first draft of an order which would stop production in mines primarily or exclusively producing gold was submitted, on September 9, 1942, to the Deputy Director General for Industry Operations, WPB, by the Miscellaneous Minerals Branch (R. 85). An accompanying memorandum (R. 85–90) recapitulated all the varying problems involved in a partial cessation of gold mine operations. The memorandum estimated the number of mines to be affected, the labor involved, and gave an estimate that 25 percent of the mine laborers might be diverted to work in other mines (R. 86–87). The memorandum weighed the possible effect of the order on the economy of the states and communities in which mines to be affected were located. As a counterbalance to the anticipated economic hardship of the order upon affected mines and mining communities, the memorandum, besides referring to the labor factor involved, stated that (R. 87):

> Sizable amounts of critical materials will be saved in closing these gold mines. Estimates as to total current consumption of such materials are not available but the general order of magnitude of such consumption is indicated by the fact that in 1939 gold mines in the United States (excluding Alaska) spent about $17,000,000 on supplies and materials, $2,000,000 for fuel and about $5,000,000 for purchased electric energy.

On September 11, 1942, a draft order dealing with gold mines was submitted to Donald Nelson. A

memorandum, which accompanied the draft order, explained (R. 91) that the proposed order would close only those mines already determined to be nonessential to the war effort and that (R. 91):

> The result of closing these nonessential mines will be to conserve all the material which they have been using for operational and development purposes. Heretofore they have merely been denied the right to use the high preference ratings granted by Order P–56, but have been able not only to obtain certain material under P–100, but also to use their own inventories.

The anticipated effect of the order was further summarized in the following terms (R. 92):

> The basic purpose of this curtailment of gold mining is, of course, to free manpower for the mining of essential minerals, particularly nonferrous metals such as copper, zinc and lead. Because many of the gold mines are located much closer to other mines producing such strategic metals as mercury, molybdenum, tungsten, vanadium, chromium, manganese, etc., it is expected that workers will also be made available to these industries.
>
> The War Manpower Commission through the Employment Service is now taking steps to insure orderly recruiting of these gold miners and to provide for a minimum of delay in reemployment as well as to provide transportation expenses. It is expected that this procedure will make possible the maximum diversion of labor to essential mining industries where their skills can be used to best advantage.
>
> Besides diverting manpower to essential industries, this order, when in effect, will also conserve some materials and supplies used in gold mining, such as mercury, drill steel, etc.

The proposed order, which by September 25 had been designated as L–208, was circulated among several interested branches of the WPB throughout the month of September (R. 96) and was the subject of a memorandum to Donald Nelson by Morris Creditor, Special Assistant to Nelson, in which the pros and cons of the order were discussed and suggestions as to form were made (R. 1204–1205).

On September 30, 1942, Senators McCarran and Gurney and Representatives Case and Englebright, at a meeting with WPB officials (R. 97), voiced the hardships that would be imposed on the inhabitants of gold mining communities and the detrimental effect on morale if the order were issued (R. 97). On October 1, a meeting was held attended by WPB officials (R. 1212), representatives of the gold mining industry (R. 1213), the War Department, the War Manpower Commission and Senator Gurney and Representatives Case and Englebright. Arguments for and against the order were advanced, and its possible effectiveness as a partial solution to the manpower problem was questioned.[16]

On October 2, Under Secretary of War Robert P. Patterson wrote the WPB, in part as follows (R. 99):

> I hope that prompt and effective action will be taken with regard to gold mining. I need not call your attention to the urgent need for more miners in the production of copper and other nonferrous metals as you know the situation as well as I do. The longer the delay in shutting down gold mining, the further off will

[16] On October 3, 1942, Wilbur Nelson reported that based on figures supplied by gold mine operators the proposed order would make available "only about 600 miners and muckers [underground workers] for other mining enterprises" (R. 99).

be the relief of the copper shortage. The matter has hung fire for some time, and I trust that there will be no further delay.

If it is thought best to have the order approved by the War Department and the Navy Department, I will be glad to give the War Department's approval, and I believe that Mr. Forrestal will do the same for the Navy.

And on October 5, Under Secretary of War Patterson and Under Secretary of the Navy Forrestal sent the following memandum to Donald Nelson (R. 99–100):

> The case of gold mining presents sharply the question whether we mean business or not in doing everything possible to push war production.
>
> There are two thousand to three thousand hard-rock miners engaged in gold mining, now of no use in war production. These men could help out substantially in relieving the labor shortage in copper mining. They will not help out in copper mining so long as gold mining is carried on.
>
> The present situation in production of copper, due to shortage in the supply of miners, is so alarming that the Army is about to furlough soldiers to go back to work on mining of copper. This is a hard step for the Army to take. But the effect of this step and others will not give complete relief if nothing is done to transfer gold miners to copper mining.
>
> The matter has hung fire for some time. We deem it of the utmost importance that prompt action be taken and that half measures be avoided.

The proposed gold order was presented to the WPB at its meeting of October 6, 1942. The minutes of this meeting, so far as pertinent, are as follows (R. 100–101):

Mr. Batt reported that the matter of shutting down United States gold mines had been receiving detailed attention. On conferring with Brigadier General McSherry of the War Manpower Commission and representatives of the gold mining companies, it had been found that at present the gold mining industry employs 3,270 workers; 750 are engaged in dredging and only 896 are hard-rock miners. Loss of labor to the Services and to war industries, and higher costs have already sharply curtailed operations of all domestic mines except Homestake. Homestake's labor force has dropped from a peak of slightly over 2,000 workers to 1,876, including lumbermen and machine shop workers. If Homestake were shut down except for standby operations, all but 500 of these workers could be released for work elsewhere. Lead and Deadwood, South Dakota, with aggregate populations of 16,000 are totally dependent on the mine's operation.

Although it has recently emphasized other forms of production, the State Department, because of broad international considerations, heretofore has urged that gold mining in South Africa and Honduras be maintained. The South African economy and the stability of the present government are largely dependent on gold mining. The basic industries of Honduras are the cultivation of bananas, of which exportation to the United States has been reduced to 20 percent of normal, and gold mining. Mr. Leon Henderson reported that Canadian gold mining is being curtailed very sharply. The Vice President pointed out that questions pertaining to production of gold abroad should appropriately be discussed with the Board of Economic Warfare.

Mr. Batt stated that after investigation he recommends that: (1) All nonessential domestic mining of gold other than that incident to the mining of critical metals be stopped as soon as

possible and not later than within 60 days; and (2) gold mines not producing critical metals be allowed to continue standby maintenance operations lest it be impossible to reopen them at the close of the war.

General Somervell stated that because of the critical shortage of copper, which is drastically curtailing ammunition production, the Army has taken the unusual precedent of furloughing 4,000 soldiers to work in the copper mines and that, under these conditions, failure to stop gold production immediately would be inexcusable.

After further discussion it was agreed that:

> An order shall be issued by the War Production Board stopping all nonessential domestic gold mining operations within 60 days and thereafter permitting only minimum maintenance to keep mines dewatered and in standby condition.

Limitation Order L–208 was issued by WPB on October 8, 1942 (7 Fed. Reg. 7992, Appendix B, *infra*, pp. 111–114). As originally issued (R. 102–105), L–208 recited that "The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense" (R. 102). The order required that operators of nonessential mines take steps to close down and prohibited, after seven days, an operator of a nonessential mine from acquiring, consuming, or using any material, facility, or equipment to break new ore or to proceed with any development work or any new operation. Sixty days after the issuance date, material, facilities, and equipment were not to be used to remove ore or waste from a mine except to the minimum amount necessary to main-

tain buildings, machinery, and equipment in repair. The order excepted from its operation, with limitations, mines which produced 1,200 tons or less ore in 1941, and provided that the order did not prohibit the use or operation of a mill, machine shop, or other facilities in the manufacture of articles bearing a preference rating of A–1–k or higher or in milling ores for the holder of a serial number under P–56. Provision was made for appeal where compliance would work "an exceptional and unreasonable hardship" (R. 104).[17]

L–208 was amended (R. 1574 C–D) on November 19, 1942 (7 Fed. Reg. 9613, App. B, *infra,* pp. 114–118) so as to prohibit the sale or other disposition or acceptance of delivery of any machinery or equipment of the types listed in Schedule A to Preference Rating Order P–56 (R. 1276–1277) except with the specific permission of the Director General of Operations, WPB, and each operator was required to submit an itemized list of Schedule A machinery and equipment indicating each item available for sale or rental.[18]

The possible recission of L–208, as then amended, was considered by the WPB at its meeting of June 15, 1943 (R. 1601–1607). The history of L–208 was reviewed by Chairman Donald Nelson, who recalled that L–208 was issued to divert men and materials into essential nonferrous mines, particularly copper mines, to relieve a situation that became particularly acute in the last half of 1942. Referring to L–208 and the fact that the Army in 1942 had furloughed 4,000 hard-rock miners for work in the copper mines, Nelson said that these actions had relieved the situation

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[17] On October 10, 1942, United States Senators from twelve gold-producing states wrote the President requesting that he personally stay WPB Limitation Order L–208 (R. 107–111).

[18] The amendment to L–208 on November 25, 1942 (7 Fed. Reg. 9810) effected no substantive change in the original order.

to some extent—that the net gain in 1943 output of copper, lead, and zinc was estimated at 6,000 tons. Although not all the gold miners displaced by L–208 transferred to other mining operations, many were placed in other war industries. In addition, Nelson said (R. 1606–1607):

> By closing the nonessential gold mines a great deal of equipment was made idle and became available for essential activities. It is estimated that by the middle of May 1943, 2,200,000 dollars of used gold mining equipment had been transferred to essential activities and transfers are continuing at the rate of about 100,000 dollars per week. It is also pointed out that nonessential gold mines normally consume a large quantity of critical materials and their closing may have made as much as 10–20,000,000 dollars of materials available for essential consumption, less a small amount which they continue to absorb for maintenance and standby operations. Rescission would undo these benefits. The Chairman stated that he is unwilling to approve the production of gold at the expense of copper, a most critical material. Mr. Ickes concurred.
>
> The Chairman emphasized that the copper situation is still critical. Requirements for the third quarter this year were 40,000 tons in excess of indicated supply and our stockpile has been seriously depleted. (See WPB Minutes, April 27, 1943, Item 2.) Production has again turned downward. The present labor shortage in the copper mines, mills, smelters, and refineries is estimated at 4,700 workers. This shortage must be corrected and additional 3–4,000 workers supplied to the copper mining industry if the present capacity and projected increased facilities are to be fully utilized during the balance of this year and in 1944. Other non-ferrous mining industries are facing sim-

ilar shortages. The War Production Board has discussed with Army officials the furloughing of 7,000 additional soldiers for work in the copper mining industry. The War Department is reluctant to do this until assured that all other practical solutions have been exhausted, such as diverting all possible miners from gold mines.

The Chairman stated that the principal argument made by the proponents of gold mining is the economic dependence of the various mining communities on continued operation of gold mines. Another argument is that gold mining machinery is being exported to Latin America and South Africa. The Vice President stated that South African economy is vitally dependent on gold mining and its cessation there would have vastly more serious results than in the United States. It may well be true that in order to preserve the economic and political stability of other countries, a smaller quantity of critical materials would have to be exported in the form of gold mining machinery than in other forms if gold mining were discontinued there. Our exports of gold mining machinery have been far less than requested. The Chairman observed that even if materials were saved by prohibiting the export of gold mining machinery, our domestic economy would not benefit from the labor released by closing foreign mines. He stated that he would have a study made of the volume of gold mining machinery exported.

Upon motion by Mr. Lubin [Economic Adviser to the President, acting for Mr. Harry L. Hopkins] and seconded by Mr. Ickes, it was unanimously agreed that:

Limitation Order L–208 shall be continued with exceptions allowed on appeal only if

(a) The critical material output of the individual mine makes an equal or larger contribution to the war effort than the ma-

terials, equipment, and labor used in operating the mine, considering the relative urgencies of the critical materials involved, or

(b) the necessary labor can be obtained without drawing upon any essential war activities, and certification to this effect can be obtained from the War Manpower Commission.

On August 31, 1943, L–208 was again amended (8 Fed. Reg. 12007–12008, App. B, *infra*, pp. 118–123), by adding a Schedule A (App. B, *infra*, pp. 123–125) which enumerated 74 items of mining equipment and machinery and required each operator of a nonessential mine to submit an inventory of such equipment and machinery, and prohibited the owner from selling, transferring, or otherwise disposing of such material except to a producer holding a serial number under Orders P–56, P–58, or P–73 [19] or with the specific permission of the WPB after a request submitted to the Mining Division of the WPB. Each transfer to a P–56, P–58, or P–73 holder was required to be reported to WPB with the name of the transferee and the identity of the items transferred.[20]

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[19] Preference Order P–58 provided for the assignment of preference ratings for material for maintenance and operation of South American copper mines. P–73 as amended, 8 Fed. Reg. 3667, provided for preference ratings for smelters and refiners of thirteen metals ranging from antimony through zinc.

[20] On November 17, 1943, Representative Engle introduced a bill (H. R. 3682) to rescind L–208. The bill, referred to the Committee on the Judiciary (89 Cong. Rec. 9653), was never reported. Other measures providing for varied forms of relief for gold mine operators forced to suspend operations because of wartime restrictions were introduced but uniformly failed of passage. See, *e. g.*, in the 78th Congress, S. 27 (89 Cong. Rec. 34), reported, S. Rep. No. 271, 78th Cong., 1st Sess. (89 Cong. Rec. 5187), amended and passed (89 Cong. Rec. 6094–6095), re-

(3) By the issuance date of L–208, the Allied counter-offensive against the Axis forces had begun. United States forces had landed on Guadalcanal and the Aleutian Islands, and the Allied invasion of North Africa was in the offing. The Germans had been halted at El Alamein, and the retreat to Tunisia was soon to follow. In November 1942, the German defeat at Stalingrad marked the start of the Russian winter offensive. With the Allies assuming the offensive, the necessity for mountains of war material to sustain the offensives underway and those still in the planning stage was imperative and was to continue unabated until August 1945.

The task of producing the hundreds of thousands of varied implements necessary to modern global warfare, of course, rested, primarily, upon the productive might of the United States. That American industry, under the strictest of governmental regulation, was equal to the occasion is attested by the defeat of the Axis powers and confirmed by the production records over the five-year period—July 1940 to August 1945. In this period, 299,300 military and special purpose

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ferred to House Committee on Mines and Mining (89 Cong. Rec. 6180); S. 344 (89 Cong. Rec. 141); H. R. 3009 (89 Cong. Rec. 6181); H. R. 5093 (90 Cong. Rec. 6587); in the 79th Congress, H. R. 4393 (91 Cong. Rec. 9726); in the 80th Congress, H. R. 950 (93 Cong. Rec. 329).

In the 81st Congress, S. 45, introduced by Senator McCarran (95 Cong. Rec. 39), provided that operators of mines affected by L–208 present their claims to the Treasurer of the United States, who would then determine the validity and amount of the claims by use of any government facility (95 Cong. Rec. 2764). Though favorably reported (95 Cong. Rec. 14811) by the Senate Judiciary Committee (S. Rep. No. 79, 81st Cong., 1st Sess.), S. 45 was objected to (95 Cong. Rec. 2764, 13297, 14722; 96 Cong. Rec. 1278, 14691, 16592) and never received floor consideration. See also, H. R. 7851, 81st Congress (96 Cong. Rec. 4066).

aircraft were produced; 72,100 naval ships totalling 8.5 million displacement tons were built; merchant ships built for the Maritime Commission totalled 4,900 with a dead-weight tonnage of 51.4 million; the production of tanks reached 86,700; and the production of planes, ships, and tanks was paralleled by the equally impressive production of other weapons.[21] These achievements are the more remarkable when it is realized that the civilian economy during the same period was provided with a greater total amount of commodities and services than in such prewar years as 1937 or 1939.[22]

The success of the United States in accelerating its output of munitions rested principally upon two major factors: The sharp increase in the nation's total production of goods and services, which, measured in terms of 1939 dollar values, increased 52 per cent and the disproportionately great increase in manufacturing, mining, and construction industries, which doubled production between 1939 and 1944. The manufacturing industries alone trebled their output, and production of raw materials rose by 60 per cent.[23]

Those achievements were possible only through the maximum utilization of plant facilities, machinery, tools, raw materials, and manpower. For this reason, WPB at the height of the war regulated 100,000 transactions a week and controlled the activities of 250,000 manufacturers, wholesalers, and

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[21] *Industrial Mobilization for War. History of the War Production Board and Predecessor Agencies*, 1940–1945, Vol. I, pp. 962–963.

[22] *Wartime Production Achievements and the Reconversion Outlook*. Report of the Chairman, War Production Board, October 9, 1945, pp. 1–3.

[23] *Industrial Mobilization for War*, *op. cit.*, pp. 963–964.

retailers [24] through thousands of regulatory "L", "M", and "P" and other type orders and amendments. WPB regulation, in the course of the war, literally touched upon every segment of the industrial economy—from such basic commodities as steel,[25] and copper [26] to such seeming irrelevancies as corsets [27] and honey [28] and such obscurities as nutgalls [29] and istle.[30]

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[24] O'Brian and Fleischmann, *op. cit.*, p. 5.
[25] M–126 (7 Fed. Reg. 3364).
[26] M–9–c (6 Fed. Reg. 5394).
[27] L–90 (7 Fed. Reg. 3033).
[28] M–118 (7 Fed. Reg. 2388).
[29] M–204 (7 Fed. Reg. 6210).
[30] M–138 (7 Fed. Reg. 3474).

APPENDIX B

War Production Board Orders

1. War Production Board Limitation Order L–208, issued October 8, 1942 (7 Fed. Reg. 7992–7993), provided as follows:

> The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense.
>
> § 3093.1 *Limitation Order L–208*—(a) *Definitions.* For the purposes of this order, "nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.
>
> (b) *Restrictions upon production.* (1) On and after the issuance date of this order, each operator of a nonessential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.
>
> (2) In no event on or after 7 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any develop-

ment work or any new operations in or about such mine.

(3) In no event on or after 60 days from the issuance date of this order shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair, and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the issuance date of this order, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the issuance date of this order, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b) (3) above.

(e) *Records.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore.

(f) *Reports.* All persons affected by this order shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to: War Production Board, Mining Branch, Washington, D. C., Ref.: L–208.

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith

would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 8th day of October 1942.

ERNEST KANZLER,
Director General for Operations.

2. War Production Board Limitation Order L–208, as amended November 19, 1942 (7 Fed. Reg. 9613–9614), provided as follows:

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense:

§ 3093.1 *Limitation Order L–208*—(a) *Definitions.* For the purposes of this order

(1) "Nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the operator of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.

(2) With respect to any nonessential mine, "effective date" means October 8, 1942, or the date of cancellation by the Director General for Operations of the serial number for such mining enterprise, whichever is the later.

(b) *Restrictions upon production.* (1) On and after the effective date, each operator of a nonessential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after seven days from the effective date shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after sixty days from the effective date shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1,200 tons or less of commercial ore in the year 1941, provided the rate of production of such mine, after the effective date, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1,000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the effective date, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the

mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(6) Nothing contained in this order shall prohibit any owner of a mining claim from performing not more than the minimum assessment work required by the provisions of section 2324 of the Revised Statutes of the United States and by Public No. 542, 77th Congress, 2d Session.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the Director General for Operations issued after application made to the Mining Branch, War Production Board.

(d) *Assignment of preference ratings.* The Director General for Operations, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b) (3) above.

(e) *Restrictions on disposition of machinery and equipment.* No person shall sell or otherwise dispose of any machinery or equipment of the types listed in Schedule A to Preference Rating Order P–56, which has been used in a nonessential mine, and no person shall accept delivery thereof, except with specific permission of the Director General for Operations. On or before November 19, 1942, or within sixty days after the effective date, whichever is later, each operator of a nonessential mine shall

file with the War Production Board, Washington, D. C., Reference: L–208, an itemized list of such machinery and equipment, signed by such operator or an authorized official, indicating each item available for sale or rental. Upon receipt of such itemized list, the War Production Board will furnish to the operator appropriate forms to be filled out for each item which the operator desires to dispose of.

(f) *Records and reports.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore, and shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to: War Production Board, Mining Branch, Washington, D. C., Ref.: L–208.

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by a fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith

would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting forth the pertinent facts and the reason he considers he is entitled to relief. The Director General for Operations may thereupon take such action as he deems appropriate.

(k) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7, F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 19th day of November 1942.

ERNEST KANZLER,
Director General for Operations.

3. War Production Board Limitation Order L–208, as amended August 31, 1943 (8 Fed. Reg. 12007–12008), provided as follows:

The fulfillment of requirements for the defense of the United States has created a shortage in the supply of critical materials for defense, for private account and for export which are used in the maintenance and operation of gold mines; and the following order is deemed necessary and appropriate in the public interest and to promote the national defense:

§ 3201.6[1] *Limitation Order L–208*—(a) *Definitions.* For the purposes of this order

(1) "Nonessential mine" means any mining enterprise in which gold is produced, whether lode or placer, located in the United States, its territories or possessions, unless the opera-

[1] Formerly Part 3093, § 3093–1.

tor of such mining enterprise is the holder of a serial number for such enterprise which has been issued under Preference Rating Order P–56.

(2) With respect to any nonessential mine, "effective date" means October 8, 1942, or the date of cancellation by the War Production Board of the serial number for such mining enterprise, whichever is the later.

(3) "Operation" means any and all work in or about a mining enterprise; and includes not only mining but also treatment of ore or placer material from such enterprise. It also includes all prospecting, exploration work, and development work.

(b) *Restrictions upon production.* (1) On and after the effective date, each operator of a nonessential mine shall immediately take all such steps as may be necessary to close down, and shall close down, in the shortest possible time, the operations of such mine.

(2) In no event on or after seven days from the effective date shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to break any new ore or to proceed with any development work or any new operations in or about such mine.

(3) In no event on or after sixty days from the effective date shall any operator of a nonessential mine acquire, consume, or use any material, facility, or equipment to remove any ore or waste from such mine, either above or below ground, or to conduct any other operations in or about such mine, except to the minimum amount necessary to maintain its buildings, machinery, and equipment in repair and its access and development workings safe and accessible.

(4) The provisions of this order shall not apply to any lode mine which produced 1,200 tons or less of commercial ore in the year 1941,

provided the rate of production of such mine, after the effective date, shall not exceed 100 tons per month, nor to any placer mine which treated less than 1000 cubic yards of material in the year 1941, provided that the rate of treatment of such placer mine, after the effective date, shall not exceed 100 cubic yards per month.

(5) Nothing contained in this order shall limit or prohibit the use or operation of the mill, machine shop, or other facilities of a nonessential mine in the manufacture of articles to be delivered pursuant to orders bearing a preference rating of A–1–k or higher, or in milling ores for the holder of a serial number under Preference Rating Order P–56.

(6) Nothing contained in this order shall prohibit any owner of a mining claim from performing not more than the minimum assessment work required by the provisions of section 2324 of the Revised Statutes of the United States and by Public No. 542, 77th Congress, 2d Session.

(c) *Restrictions on application of preference ratings.* No person shall apply any preference rating, whether heretofore or hereafter assigned, to acquire any material or equipment for consumption or use in the operation, maintenance, or repair of a nonessential mine, except with the express permission of the War Production Board issued after application made to the Mining Division, War Production Board.

(d) *Assignment of preference ratings.* The War Production Board, upon receiving an application in accordance with paragraph (c) above, may assign such preference ratings as may be required to obtain the minimum amount of material necessary to maintain such nonessential mine on the basis set forth in paragraph (b) (3) above.

(e) *Restrictions on disposition of machinery and equipment.* (1) On or before October 30,

1943, or within 60 days after the effective date, whichever is later, each operator of a nonessential mine shall file with the Mining Division, War Production Board, Washington, 25, D. C., Reference: L–208, an itemized list of all machinery and equipment of the types listed in Schedule A, which were in use in, or held in connection with, such nonessential mine on such date. Such schedule shall be signed by such operator or an authorized official, giving complete specifications and conditions for each item. This provision, with respect to reporting, applies only to mines for which an itemized list of machinery and equipment has not been filed with the War Production Board as required by this order prior to August 31, 1943. Any operator who so desires may report items which he wishes to sell or rent on WPB Form 2574 in triplicate and transmit to the nearest regional War Production Board office.

(2) On and after August 31, 1943, no person who owns on the effective date machinery or equipment of the types listed in Schedule A, which was in use in, or held in connection with, a nonessential mine on the effective date, shall sell, transfer, or otherwise dispose of any thereof, and no person shall accept delivery thereof, except:

(i) With specific written permission of the War Production Board, issued after request to the Mining Division; or

(ii) To a producer holding a serial number under Orders P–56, P–58, or P–73.

(3) On and after August 31, 1943, any operator who sells, transfers, or otherwise disposes of any item listed in Schedule A to a producer holding a serial number under Orders P–56, P–58, or P–73 shall immediately report such transaction to the Mining Division of the War Production Board, Washington 25, D. C., Reference: L–208, giving the following information:

a. Name of company and mine from which transferred.

b. Identity of items transferred.

c. Name of producer acquiring equipment and serial number of mine for which equipment is acquired.

(f) *Records and reports.* All persons affected by this order shall keep and preserve, for not less than two years, accurate and complete records concerning inventory, acquisition, consumption, and use of materials, and production of ore, and shall execute and file with the War Production Board such reports and questionnaires as said Board shall from time to time prescribe.

(g) *Audit and inspection.* All records required to be kept by this order shall, upon request, be submitted to audit and inspection by duly authorized representatives of the War Production Board.

(h) *Communications.* All reports to be filed, appeals, and other communications concerning this order should be addressed to: War Production Board, Mining Division, Washington 25, D. C., Ref.: L–208.

(i) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States, is guilty of a crime, and upon conviction may be punished by a fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(j) *Appeal.* Any person affected by this order who considers that compliance therewith would work an exceptional and unreasonable hardship upon him may appeal to the War Production Board, by letter, in triplicate, setting

forth the pertinent facts and the reasons he considers he is entitled to relief. The War Production Board may thereupon take such action as it deems appropriate.

(k) *Applicability of priorities regulations.* This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(P. D. Reg. 1, as amended, 6 F. R. 6680; W. P. B. Reg. 1, 7 F. R. 561; E. O. 9024, 7 F. R. 329; E. O. 9040, 7 F. R. 527; E. O. 9125, 7 F. R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

NOTE: The reporting requirements of paragraph (e) have been approved by the Bureau of the Budget, pursuant to the Federal Reports Act of 1942.

Issued this 31st day of August 1943.

WAR PRODUCTION BOARD,
By J. JOSEPH WHELAN,
Recording Secretary.

Schedule A

1. Aerial tramway equipment
2. Agitators
3. Assay and testing laboratory equipment
4. Automatic feeders, ore, reagent
5. Blowers (flotation)
6. Blowers (ventilation)
7. Cable, electrical
8. Cable, steel
9. Cages and skips
10. Chain blocks
11. Churn drills and accessories
12. Classifiers
13. Compressors, vacuum pumps [2]
14. Concentrating tables

[2] Release for transfer of compressors, covered by Limitation Order L–100, must be secured in accordance with the provisions of that order, and should be identified as an L–208 case.

15. Conveyors, belt, chain, or gravity
16. Crushers (stationary types)
17. Draglines [1]
18. Dredges (mining)
19. Drill presses
20. Drill steel
21. Drills (diamond)
22. Drills (rock, except portable mounted)
23. Dump, rotary track, other
24. Dust control equipment
25. Electrical equipment, other than electric motors
26. Electric motors
27. Explosive equipment
28. Filters
29. Filter presses
30. Flotation machines
31. Furnaces, oil fuel, electric
32. Generators and motor generator sets
33. Granulators, ball mills, etc.
34. Grinders (air and electric)
35. Hack saws, power
36. Head frames
37. Hoists (mine)
38. Hydraulic monitors
39. Jacks (roof)
40. Jigs
41. Lamps, ore exploration
42. Lathes
43. Locomotives (mine)
44. Mucking machines
45. Ore bins (steel)
46. Power tools (portable)
47. Power units (Diesel, gasoline accessories)

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[1] Transfer or any change in status of these types of equipment which come under the provisions of Order L–196, Used Construction Equipment, should also be reported on WPB Form 1333 to the Used Construction Equipment Regional Specialist in the War Production Board Regional Office in the region in which such equipment is located, and marked L–208 case.

48. Presses, hydraulic
49. Pumps (dewatering and supply, larger than 90,000 gallons per hour)[1]
50. Pumps (other, deep well, diaphragm, centrifugal, plunger, sand, and vacuum)
51. Rail and track accessories
52. Receivers (air)
53. Rubber hose (air, water)
54. Safety and defense equipment
55. Saws (power (swing) table)
56. Scrapers (slusher type)
57. Scrapers (carrying or hauling, both drawn and self propelled)[1]
58. Screens
59. Sheaves and sheave blocks
60. Sharpeners (steel)
61. Shovels, power[1]
62. Slusher hoists
63. Storage batteries
64. Tanks (steel and wood)
65. Thickeners
66. Tractors and attachments[1]
67. Trailers
68. Transformers
69. Trucks
70. Washing plant (gold placer)
71. Welding machines (electric, gas)
72. Weighing equipment (automatic, other)
73. Winches (tractor mounted)[1]
74. Winches, other

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